TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS, ETC., ET AL., APPELLANTS,

vs.

WILLIAM D. KELLY, STATE TAX COMMISSIONER OF NEW JERSEY

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JANUARY 18, 1943.

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[fol. 1] **SUPREME COURT OF NEW JERSEY**

WRIT OF CERTIORARI—April 30, 1941

NEW JERSEY, ss.:

(L. S.)

The State of New Jersey to The Honorable Luther A. Campbell, Ordinary of the State of New Jersey, and Thomas A. Mathis, Register of the Prerogative Court of the State of New Jersey—Greeting:

We being willing for certain reasons to be certified of a certain decree or order made by you, Luther A. Campbell, Ordinary of the State of New Jersey, under date of March 27th, 1941, in a cause wherein Central Hanover Bank and Trust Company, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually were appellants, and J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey was the respondent, which decree or order affirmed an assessment of transfer inheritance taxes by the State Tax Commissioner of the State of New Jersey:

We Do Hereby Command You, Thomas A. Mathis, Register of the Prerogative Court of the State of New Jersey, that you certify and send under seal to our Justices of our Supreme Court of Judicature, at Trenton, on the 20th day of May, 1941, the said decree of the Ordinary of the Prerogative Court, together with the record of said Prerogative Court in said matter, including the notice of appeal, petition of appeal, answer, affidavits and exhibits, stipulations and conclusions filed therein, together with any and all other things touching and concerning said appeal as fully and completely as they remain before you, together with this writ; that therein may be done what of right and ac-

[fol. 2] cording to the laws of this state ought to be done.

Witness, Honorable Thomas J. Brogan, Chief Justice of our Supreme Court, at Trenton, this 30th day of April, 1941.

Fred L. Bloodgood, Clerk.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutors-Petitioners.

SUPREME COURT OF NEW JERSEY

ALLOCATUR—April 26, 1941

I allow this writ. Let it be sealed.
Charles W. Parker, Supreme Court Justice.

IN SUPREME COURT OF NEW JERSEY

RETURN TO WRIT

In obedience to the command of this writ to me directed, I, Luther A. Campbell, Ordinary or Surrogate General of the State of New Jersey and Judge of the Prerogative Court of the State of New Jersey, Do Hereby Certify and send to the Honorable Justices of the Supreme Court, within mentioned, the order or decree made by me on the twenty-seventh day of March, 1941 by virtue of the powers conferred upon me by Title 54, Chapter 34 of the Revised Statutes and supplements and amendments thereto, affirming the assessment and transfer inheritance tax made on February 11, 1938 by the State Tax Commissioner in the matter of the Estate of George W. E. Atkins, deceased, late of [fol. 3] Essex County, New Jersey, insofar as said assessment includes a tax on the transfers of the installments coming due at and after the death of the decedent and payable to George Chew Atkins and John Norton Atkins, sons of the decedent, under the six refund annuity agreements or policies of the Equitable Life Assurance Society of New York and the New York Life Insurance Company, and insofar as said assessment includes a tax on the transfers to said two sons of the grantor of the equitable interests in remainder under the deed of trust executed by the decedent on May 16, 1929, in the matter of the Estate of George W. E. Atkins, deceased wherein the Central Hanover Bank and Trust Company, George Chew Atkins and John Norton Atkins as executors under the last will and testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins individually were appellants and J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey is respondent, together with the record of the said assessment of transfer inheritance tax above mentioned, together also with the petition of appeal pre-

sented to me and the answer of State Tax Commissioner to said petition of appeal and all other proceedings and matters touching and concerning said decree, assessment and appeal and said petition of appeal and the proceedings thereunder as fully as the same remain before me or under my control, as by the transcript of the same under my hand and the seal of the Prerogative Court certified and annexed more fully appears.

Luther A. Campbell, Ordinary. (Seal.)

[fol. 4] PREROGATIVE COURT OF NEW JERSEY

In the Matter of the Appeal from the Assessment Levied Against the ESTATE OF GEORGE W. E. ATKINS, DECEASED

STIPULATION—Filed July 7, 1938

It is hereby stipulated and agreed by and between Child, Riker, Marsh & Shipman, Proctors for Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, and David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner, that attached hereto are true copies of the papers and other documents or abstracts thereof constituting the record in the matter of the assessment of the tax levied by the State Tax Commissioner of the State of New Jersey against the Estate of George W. E. Atkins, deceased, and that the same shall constitute the transcript of the said record to be used by the [fol. 5] Prerogative Court in the determination of the appeal filed in said matter.

Dated:

Child, Riker, Marsh & Shipman, Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually; David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

PREROGATIVE COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL—Filed April 12, 1938

To the State Tax Commissioner of the State of New Jersey.
To the Clerk of the Prerogative Court of the State of New Jersey:

SIRS:

Take notice that Central Hanover Bank and Trust Company, a banking corporation organized under the laws of [fol. 6] the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins individually, hereby appeal to the Prerogative Court of the State of New Jersey from the assessment made by the State Tax Commissioner of the State of New Jersey in the matter of the Estate of George W. E. Atkins, deceased, wherein and whereby he fixed and determined the net cash value of the said estate at the sum of $601,466.18, and also from the assessment made by the said Commissioner against George Chew Atkins in the amount of $298,991.86 for the transfer to him in the above estate and fixing a tax of $9,899.59 thereon, and also from the assessment made by the said Commissioner against John Norton Atkins in the amount of $302,474.32 for the transfer to him in the above estate and fixing a tax of $10,988.05 thereon.

Dated: April 11th, 1938.

Child, Riker, Marsh & Shipman, Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually.

Service of the within Notice of Appeal in hereby acknowledged this 12th day of April, 1938.

David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

[fol. 7] PREROGATIVE COURT OF NEW JERSEY

[Title omitted]

PETITION OF APPEAL—Filed April 12, 1938

To the Ordinary of the State of New Jersey:

The petition of Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, appellants in the above stated matter, respectfully shows:

1. That your petitioners find themselves aggrieved by an assessment levied against the Estate of George W. E. Atkins, deceased, by the State Tax Commissioner of the State of New Jersey, wherein and whereby he fixed and determined the net value of said estate to be the sum of $601,466.18 upon the ground that the same is erroneous, illegal and void for that in determining and levying the said assessment the said Tax Commissioner of the State of New Jersey included as a part of the taxable assets thereof the sum of $28,683.30, being the amount payable to George Chew Atkins and John Norton Atkins under and in accordance with certain annuity policies of the Equitable Life As-
[fol. 8] surance Company of the United States and the New York Life Insurance Company, as follows:

Company	Beneficiary	Amount
Equitable Life—#9,142,731	George Chew Atkins and John Norton Atkins	$4,787 73
Equitable Life—#9,260,836	George Chew Atkins and John Norton Atkins	3,322 77
Equitable Life—#9,545,296	George Chew Atkins and John Norton Atkins	4,786 42
Equitable Life—#8,877,293	John Norton Atkins	3,808 87
Equitable Life—#8,948,433	George Chew Atkins	4,138 67
New York Life—#303,553	George Chew Atkins and John Norton Atkins	7,838 84

whereas, the moneys so received are not taxable property of the said estate and the transfer thereof is not a taxable transfer within the provisions of the statute in such case made and provided, for the following reasons:

a. The moneys are the proceeds of a contract of insurance and the payment of the same to the beneficiaries is not a

transfer of property by deed, grant, bargain, sale or gift made in contemplation of the death of George W. E. Atkins.

b. The moneys are the proceeds of a contract of insurance and the payment of the same to the beneficiaries is not a transfer of property by deed, grant, bargain, sale or gift to take effect in possession or enjoyment at death of George W. E. Atkins.

c. The moneys are the proceeds of a contract of insurance and as such are exempt from taxation under the provisions of the statute in such case made and provided.

[fol. 9] 2. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey, wherein and whereby he fixed and determined the net value of the said estate to be the sum of $601,466.18 upon the ground that the same is erroneous, illegal and void for that in determining and levying the said assessment the said State Tax Commissioner of the State of New Jersey included as part of the taxable property of said estate the sum of $376,917.04, being the appraised value of the securities comprising a certain trust fund created by and in accordance with an agreement of trust made on the 16th day of May, 1929, by and between George W. E. Atkins and the Central Hanover Bank and Trust Company of the City of New York, whereas the bonds, stocks, mortgages and cash belonging to such trust fund are not taxable property in accordance with the statue in such case made and provided, for the following reasons:

a. The State of New Jersey had no jurisdiction to tax the property as it did not have a taxable situs within the States of New Jersey at the time of the transfer thereof.

b. The transfer alleged to be subject to the tax occurred without the territorial boundaries of the State of New Jersey and is, therefore, not taxable by the State of New Jersey.

[fol. 10] c. The property comprising the said trust fund was located without the territorial boundaries of the State of New Jersey at the time of the execution of the said agree-

ment of trust on May 16th, 1929; the said agreement was executed by the parties thereto outside of the State of New Jersey, the legal title of said property transferred thereby to the Central Hanover Bank and Trust Company, a resident of the State of New York and domiciled therein, and that the legal title and possession of all of the said property has always remained in said Central Hanover Bank and Trust Company and the trust fund entirely administered by the Central Hanover Bank and Trust Company without the State of New Jersey since the execution of the said agreement and during the entire lifetime of the said George W. E. Atkins, and the transfer thereof is not a taxable transfer within the provisions of the statute of New Jersey in such case made and provided.

d. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

e. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while with- [fol. 11] out the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

f. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fifth Amendment of the Constitution

of the United States prohibiting the taking of private property for public use without just compensation as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

g. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Sixteenth Section of the First Article of the Constitution of the State of New Jersey prohibiting the taking of private property for public use without just compensation as the State of New Jersey had no power or jurisdiction to tax property located outside of its own boun- [fol. 12] daries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

3. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against George Chew Atkins in the amount of $298,991.86 for his transfer in the above estate and the fixing of the tax thereon at the sum of $9,899.59 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to the said George Chew Atkins the sum of $10,367.88, representing the commuted value of the annuity contracts of the Equitable Life Assurance Company on policies Nos. 9,142,731, 9,260,836 and 9,545,296, and of the New York Life Insurance Company No. 303,553, and the sum of $4,138.67, representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,948,433, for the reasons more particularly set forth in paragraph one hereof.

4. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and

testament of George W. E. Atkins, deceased, and George [fol. 13] Chew Atkins, individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against George Chew Atkins in the amount of $298,991.86 for his transfer in the above estate and the fixing of the tax thereon at the sum of $9,899.59 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said George Chew Atkins the sum of $188,458.52, representing the value of one-half of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, for the reasons more particularly set forth in paragraph two hereof.

5. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against John Norton Atkins in the amount of $302,474.32, for his transfer in the above estate and the fixing of a tax thereon in the sum of $10,098.46 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said John Norton Atkins the sum of $10,367.88, representing the commuted value of the annuity contracts of the Equitable Life Assurance [fol. 14] Company on policies Nos. 9,142,731, 9,260,836 and 9,545,296, and of the New York Life Insurance Company No. 303,553, and the sum of $3,808.87, representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,877,293, for the reasons more particularly set forth in paragraph one hereof.

6. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against John Norton Atkins in the

amount of $302,474.32 for his transfer in the above estate and the fixing of a tax thereon in the sum of $10,098.46 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said John Norton Atkins the sum of $188,458.42, representing the value of one-half of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, for the reasons more particularly set forth in paragraph two hereof.

Your petitioners, therefore, pray that the action of the State Tax Commissioner of the State of New Jersey in fixing the assessment aforesaid and imposing a transfer inheritance tax upon their and each of their transfers in the [fol. 15] Estate of George W. E. Atkins, deceased, respectively, may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem just.

Child, Riker, Marsh & Shipman, Proctors for Appellants.

Service of the within Petition of Appeal is hereby acknowledged this 12th day of April, 1938.

David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

[fol. 16] Prerogative Court of New Jersey

[Title omitted]

Answer to Petition of Appeal—Filed May 16, 1938

Respondent, answering the petition of appeal says:

1. Paragraphs 1, 2, 3, 4, 5, and 6 are denied.

David T. Wilentz, Attorney General of New Jersey, Proctor for Respondent. William A. Moore, Of Special Counsel.

Consent to the filing of the within Answer as within time is hereby given this Second day of May, 1938.

Child, Riker, Marsh & Shipman; Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually.

[fol. 17] PREROGATIVE COURT OF NEW JERSEY

INHERITANCE TAX RETURN

The Inheritance Tax Return is not re-copied in full but the following constitute the salient features thereof insofar as the same affect this appeal:

Affidavit was made by C. L. Herterich, as Assistant Vice-President of the Central Hanover Bank and Trust Company, John Norton Atkins and George Chew Atkins Executors, on the 11th of June, 1937. The affidavit recites that George W. E. Atkins died November 9th, 1936, leaving a will; that he had no safe deposit box, except one located at the Safe Deposit Company of New York, 149 Broadway, New York City, registered in the name of George W. E. Atkins.

Schedule-A: No real property.

Schedule-B: Personal property—Lists various bonds and stocks of companies, notes and bank accounts owned by George W. E. Atkins at the time of his death, totalling $215,977.62. It further lists as not taxable the following items:

Insurance Annuity Contracts

Equitable Life Assurance of the U. S. at commuted values of the remaining instalments on Nov. 9, 1936.		
Beneficiaries of Refund, George Chew Atkins and J. Norton Atkins.		
#9,142,731	$4,787.73	
9,260,836	3,322.77	
9,545,296	4,786.42	
		$12,896.92
Beneficiary of Refund, J. Norton Atkins #8,877,293		3,808.87
Beneficiary of Refund, George Chew Atkins #8,948,433		4,138.67
New York Life Insurance Co. at commuted values of the remaining instalments on Nov. 9, 1936.		
Beneficiary of Refunds, George C. Atkins and John N. Atkins $303,553		7,838.84
		$28,683.30

[fol. 18] Schedule-C: Transfers—The following is a schedule of the questions and answers appearing at the top of Schedule-C:

1. Did decedent, *within two years of death*, make any transfer of a material part of estate without receiving an adequate valuable consideration therefore? No.

2. Did decedent, *within two years of death*, transfer any property of a value of $1,000.00, or more, without having received an adequate, valuable consideration therefor? No.

3. Did decedent, *at any time*, make any transfer of property in contemplation of death without having received an adequate, valuable consideration therefor? No.

4. Did decedent, *at any time*, make a transfer of a material part of his estate, without having received an adequate, valuable consideration therefor? See copy of trust deed attached hereto.

Is it contended that such transfer was not made in contemplation of or to take effect at death? Yes.

5. Did decedent, *at any time*, transfer any property in trust by deed or agreement? Yes.

6. Did decedent, individually or jointly with another, at the time of death, possess the right to exercise any power of appointment vested in him or her under the will, deed or other instrument of another? No.

7. Did decedent, deputy, or joint renter, *within 6 months of death*, withdraw property or evidence of property from [fol. 19] any safe deposit box, registered either in decedent's individual name, jointly with another, or to which decedent had access by an agent or as agent for another, and make distribution of such property without having received an adequate, valuable consideration therefor? No.

It then lists the property held by the Central Hanover Bank and Trust Company under the trust deed of May 16th, 1929, at the time of the death. The property so listed consisted of securities of various companies totalling $372,325.69, to which are added bonds and mortgages and from which are deducted expenses on the settlement of the estate, making a net balance in the trust fund of $377,962.04.

The following examples are representative of the securities so held in the fund:

75 shares American Telephone & Telegraph Co.	$13,725.00
$5000. American Gas & Elec. Co. Gold Deb. 5%, 2028	5,375.00
8000. Brooklyn-Manhattan Trans. Corp. Coll. Trust, 4½%	8,330.00
12000. Michigan Central R. R. Co., 3½%, 1952	12,975.00
Part. B/M 890 Fox Street, N. Y. C.	8,100.00

For the purposes of this appeal, the balance of the securities comprising the trust be regarded as of similar nature to the above examples.

Schedule-D: Lists as deductions the sum of $25,363.80.

Schedule-E: Lists the surviving beneficiaries as follows: George Chew Atkins, The Woodlands, Bronto, Ontario; John Norton Atkins, Emerald Hodgson Hospital, Sewanee, Tenn.

[fol. 20] PREROGATIVE COURT OF NEW JERSEY

WILL OF GEORGE W. E. ATKINS

I, George W. E. Atkins, now residing in East Orange, in the State of New Jersey, do hereby make, publish and declare this my Last Will and Testament, hereby revoking all other wills and codicils by me at any time heretofore made.

First, I give and bequeath to my son George Chew Atkins, the one hundred shares of the capital stock, par value $100 per share, of The Woodlands Orchards, Ltd., which I now own, and I give and bequeath to my son John Norton Atkins the sum of Ten Thousand Dollars ($10,000) which may be paid either in cash or in such stocks or securities, at such values, as may be agreed upon by him and the other Executors. If, however, before my death, my son George Chew Atkins shall have purchased or caused to be purchased from me, and shall have paid for in cash at par, $100 per share, all of said one hundred shares of such stock, then this legacy of stock to him shall lapse, and in lieu thereof there shall be paid to him the sum of Ten Thousand Dollars ($10,000), either in cash or in such stocks or securities, at such values, as may be agreed upon by him and the other Executors. If either of my said sons shall predecease me, leaving issue surviving me, the surviving

issue shall take the legacy to which the parent would have been entitled, if living, per stirpes and not per capita.

Second. All the rest, residue and remainder of my property, real, personal and mixed, of whatsoever nature and wheresoever situated, I give, devise and bequeath to my Trustee hereinafter named, in trust, however, to hold, sell, invest and reinvest the same from time to time, to collect and receive the income therefrom, and

[~~fol. 21~~] (a) In case my wife Mary M. C. Atkins shall survive me—

My Trustee shall pay over to my said wife the net income from the trust estate in monthly payments in each year during her life. Upon the death of my said wife I give, devise and bequeath the principal of the trust estate to my said sons John Norton Atkins and George Chew Atkins, in equal shares in case both of them survive my wife, or if either of my said sons shall predecease my wife leaving issue her surviving, then I give, devise and bequeath to such issue the share to which the parent would have been entitled, per stirpes and not per capita; or if only one of my said sons, or surviving issue of only one of my said sons, shall survive my wife, I give, devise and bequeath to such surviving son, or to such surviving issue, per stirpes and not per capita, as the case may be, the entire trust estate.

(b) In case my wife shall not survive me, I give, devise and bequeath my entire residuary estate to my said sons John Norton Atkins and George Chew Atkins, in equal shares in case both of them survive me, or if either of my said sons shall predecease me leaving issue me surviving, them I give, devise and bequeath to such issue the share to which the parent would have been entitled to, per stirpes and not per capita; or if only one of my said sons, or surviving issue of only one of my said sons shall survive me, I give, devise and bequeath to such surviving son, or to such surviving issue, per stirpes and not per capita, as the case may be, the entire residuary estate.

[fol. 22] (c) In case upon my death neither my wife nor any son nor issue of deceased son of mine shall survive me, or in case upon the death of my wife, no son or issue of deceased son of mine shall survive her, then and in either case I give, devise and bequeath my entire residuary estate

to my brother John W. Atkins, of Key West, Florida, if he is then living, or if not, then to my heirs at law and next of kin.

(d) It is my will that the income from the trust created for my wife shall begin to accrue and become payable to her immediately upon my death, and during the period of the administration of the estate by my Executors I direct that the income be paid to her from time to time in such instalments as she may request. Upon the termination of the duties of the Executor, and the transfer of the principal to the Trustee, she shall be entitled to receive the entire balance of such income.

Provided always that if upon my death, my said wife is then physically or mentally incapable of transacting the necessary business of receiving and disbursing said income payable to her, then the same shall be paid to my said son John Norton Atkins, to be received and disbursed by him for the benefit, sustenance and maintenance of my said wife, during the remainder of her life. My Trustee shall be fully protected in relying upon any affidavit or written statement by any member of the family of my wife in respect to the existence or continuation of any such physical or mental incapacity, and until my Trustee shall have been notified in writing of the termination of any such physical or mental incapacity it shall be justified and fully protected in [fol. 23] paying over any portion of the income from the trust estate to said John Norton Atkins for expenditure for the benefit of my wife, such payments to be made to said John Norton Atkins in such amounts and in such manner as he may from time to time request in writing; and in any such case the written receipt of said John Norton Atkins for any payment or payments so made shall be full protection to my Trustee for the making of the same and my Trustee shall not be required to examine into the question of the necessity for any payment or payments so requested to be made nor in any way to supervise the expenditure by said John Norton Atkins of any money so paid over to him by my Trustee.

Third. I direct my Executors, out of my residuary estate, to pay all inheritance, transfer or succession taxes, duties or other charges which may be imposed by lawful authority with respect to the transfer of any of my property.

Fourth. The provisions herein made for the benefit of my wife shall be in lieu of dower.

Fifth. I nominate and appoint my sons George Chew Atkins and John Norton Atkins and Central Hanover Bank and Trust Company, a banking corporation organized and existing under the laws of the State of New York, and the survivors or survivor of them, or the one of them who may qualify and act hereunder, to be the Executors of this will, and said Ceneral Hanover Bank and Trust Company to be the Trustee of the trust hereby created. I give to my Executors, and the survivors or survivor of them, and to my Trustee, the following powers, authority and discretion, which may be exercised by them or it in either or both capacities, as often as may be necessary:

[fol. 24] To sell at public or private sale, upon such terms as my Trustee may consider advisable, any property, real or personal, of which I may die seized or possessed or in which my estate may be invested or reinvested; to invest and from time to time to reinvest any cash principal received or held by my Trustee, in such sound stocks (whether common or preferred), and in such bonds, securities and other property, real and personal, as my Trustee in its discretion may deem advisable, which shall be held subject to the trust hereby created, and my Trustee shall not be restricted in its choice of investments or reinvestments to such stocks and securities as are permissible investments or reinvestments to trustees by the laws of the State of New York, it being my intention to give my Trustee the same power of investment or reinvestment in real and personal property which I might myself possess and exercise in the management of my estate; to continue, in the discretion of my Trustee, to hold in trust any stocks, bonds, securities or other property, real or personal, in which my estate or any part thereof may be invested at the time of my decease; to participate in any reorganization, consolidation or merger of any corporation, the stocks, bonds or other securities of which may at any time be held in trust, and to receive and to continue to hold upon the trust hereby created, any stocks, bonds or other securities which may be allotted to my Trustee by reason of its participation in any such reorganization, consolidation or merger; to make partition, division or distribution in kind or in cash, or partly in kind and partly in cash, of any of my real

or personal property, and the determination of my Trustee as to the fairness and equality of any such partition, division [fol. 25] or distribution shall be conclusive upon all persons who may now or hereafter be or become interested in the trust estate as legatee, beneficiary or otherwise; to make, execute and deliver leases or renewals of leases of any real estate of which I may die seized, for terms not exceeding twenty-one years; to compromise, settle or arbitrate any claim or demand in favor of me or my estate or against me or my estate; to cause any stock or securities at any time held in trust, to be registered in the name of the nominee or nominees of my Trustee; to exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and to use such portion of the principle of the trust estate as may be necessary therefor, or in the discretion of my Trustee, to sell any such rights for the benefit of the trust estate. All stock dividends and all realized appreciation in the value of stocks, bonds or other securities, by sale or other disposition thereof, shall be considered principal, and not income. My Trustee shall not be required to set up any sinking or other fund to amortize or absorb the premium at which any property may have been purchased or may be held by my Trustee. My Trustee shall not be liable for loss or depreciation in value of any of the trust property or for any investment or reinvestment which it may make or may continue to hold, unless it shall have failed to act with reasonable care. In case of doubt as to the rights, duties or responsibilities of my Trustee, it may advise with counsel, and the opinion of its counsel shall be complete protection to my Trustee against liability for any action taken or omitted to be taken in reliance thereon.

[fol. 26] Neither my Executors nor my Trustee shall be required to give any bond or other security for the faithful performance of their duties, by any Court or in any jurisdiction where my estate or any part thereof may be administered.

In witness whereof, I have hereunto set my hand and seal this 16th day of May, 1929.

George W. E. Atkins. (L. S.)

Signed, sealed, published and declared by the said Testator, George W. E. Atkins, as and for his Last

Will and Testment, in the presence of us and of each of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses the day and year above written. Albert Stickney, 8 East 93rd St., N. Y. City; Clara E. Ludwig, 238 B. 118th St., Rockaway Park, L. I., N. Y.; Leslie F. Randolph, 17 So. Prospect St., Verona, N. J.

[fol. 27] PREROGATIVE COURT OF NEW JERSEY

AGREEMENT DATED MAY 16, 1929

This agreement made this 16 day of May, 1929 between George W. E. Atkins, now residing in East Orange, New Jersey, hereinafter called the Grantor, and Central Hanover Bank and Trust Company, a banking corporation organized and existing under the laws of the State of New York, hereinafter called the Trustee, Witnesseth:

The Grantor has herewith deposited with the Trustee certain property described in Schedule A hereto annexed, and now in the possession of the Trustee as a Safekeeping Account of the Grantor, receipt of which by the Trustee is hereby acknowledged, and which, together with such additional stocks, securities or other property which the Grantor may hereafter deposit with and/or convey to the Trustee subject to the trusts hereby created, shall be held by the Trustee and its successors and assigns, upon the trusts herein set forth.

1. The Trustee shall hold, manage, invest and reinvest the trust estate, and shall pay over the net income thereof to the Grantor in monthly payments in each year during his life.

(a) Upon the death of the Grantor, in case Mary M. C. Atkins, wife of the Grantor, shall survive him, the Trustee shall continue to hold, manage, invest and reinvest the trust estate, and pay over the net income therefrom to said wife of the Grantor in monthly payments in each year during her life, except that the Trustee shall, out of such net income, and as a current charge thereon, pay to the son of the Grantor, George Chew Atkins, (hereinafter called

George), in case he shall survive the Grantor, an annuity of $2,400 a year during his life, for a period not to exceed [fol. 28] the life of the Grantor's wife, payable in equal monthly instalments of $200 each, and shall in like manner, out of such net income, and as a current charge thereon, pay to the son of the Grantor, John Norton Atkins (hereinafter called John), in case he shall survive the Grantor, an annuity of $2,400 a year during his life, for a period not to exceed the life of the Grantor's wife, payable in equal monthly instalments of $200 each. *Provided always* that if upon the death of the Grantor, his said wife is then physically or mentally incapable of transacting the necessary business or receiving and disbursing said income payable to her, then the same shall be paid to his said son, John, to be received and disbursed by him for the benefit, sustenance and maintenance of his mother, the Grantor's said wife, during the remainder of her life. The Trustee shall be fully protected in relying upon any affidavit or written statement by any member of the family of the Grantor's wife in respect to the existence or continuation of any such physical or mental incapacity, and until the Trustee shall have been notified in writing of the termination of any such physical or mental incapacity it shall be justified and fully protected in paying over any portion of the income from the trust estate to John for expenditure for the benefit of the Grantor's wife, such payments to be made to said John in such amounts and in such manner as he may from time to time request in writing; in any such case the written receipt of John for any payment or payments so made shall be full protection to the Trustee for the making of the same and the Trustee shall not be required to examine into the question of the necessity for any payment or payments so requested to be made nor in any way [fol. 29] to supervise the expenditure by John of any money so paid over to him by the Trustee.

Upon the death of the Grantor's wife, the annuity payments shall cease, and the Trustee shall transfer, assign and pay over the principal of the trust estate to George and John, in equal shares, in case both of them shall survive the Grantor's wife, the surviving issue of George or John who may have died before the Grantor's wife to take the same share which their ancestor would have taken had he survived the Grantor's wife, *per stirpes*

and not *per capita;* or if only one of said sons of the Grantor, or the surviving issue of only one of said sons of the Grantor, shall survive the Grantor's wife, the Trustee shall transfer, assign and pay over the trust estate to such surviving son, or to such surviving issue, *per stirpes* and not *per capita,* as the case may be. In case upon the death of the Grantor's wife, neither George nor issue of George, nor John nor issue of John, shall survive the Grantor's wife, the Trustee shall transfer, assign and pay over the trust estate to the Grantor's brother, John W. Atkins, now a resident of Key West, Florida, if then living, or if not, then to the other heirs at law and next of kin of the Grantor.

(b) In case the Grantor's wife shall not survive the Grantor, the Trustee shall, upon the Grantor's death, divide the trust estate into equal shares, to be disposed of as follows:

In case George shall survive the Grantor, the Trustee shall transfer, assign and pay over to George one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor). In case George shall not survive the Grantor, [Vol. 30] but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita,* one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor).

In case John shall survive the Grantor, the Trustee shall transfer, assign and pay over to John one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor). In case John shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita,* one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor).

(c) In case neither the Grantor's wife, nor George nor issue of George, nor John nor issue of John, shall survive the Grantor, the Trustee shall transfer, assign and pay over the entire trust estate to the Grantor's brother, John W. Atkins, if then living, or if not living, then to the other heirs at law and next of kin of the Grantor.

2. The Trustee shall have the following powers, authority and discretion, namely: To continue to hold upon the trust hereby created any or all of the property herewith or hereafter transferred to the Trustee in trust; nevertheless, in case it shall seem to the Trustee advisable to sell or dispose of said property, in whole or in part, the Trustee may from time to time sell or dispose of the same or any property which may at any time constitute the trust estate. The [fol. 31] Trustee shall invest and from time to time reinvest the proceeds of sale of any of the trust property or any cash funds held in trust, in such sound stocks or securities as may seem to the Trustee advisable, which shall be held subject to the trust hereby created, and the Trustee shall not be restricted in making investments or reinvestments of trust funds to such stocks or securities as are permissible investments for trustees by the laws of the State of New York. The Trustee may become a party to any reorganization, consolidation or merger of any corporation, the stocks or securities of which may at any time be held in trust, and may participate in any such reorganization, consolidation or merger to the same extent and as fully as though it were the absolute and individual owner of such stocks and securities, and may receive upon any such reorganization, consolidation or merger and thereafter continue to hold in trust any property allotted to the Trustee as provided by the terms thereof. The Trustee shall not be liable for any loss or depreciation in the trust estate occurring by reason of error of judgment in making any investment or reinvestment or in continuing to hold in trust the property herewith or hereafter transferred to the Trustee or any investment or reinvestment hereafter made, unless it shall have failed to act with reasonable care. The Trustee shall not be required to establish any sinking fund to amortize the premium at which any investment or reinvestment may be purchased. All stock dividends declared upon any stocks held in trust shall be considered principal, and not income. The trustee shall not be liable for the consequences of any action taken or omitted to be taken by it in good faith in the administration of the trust hereby created, and it may consult with counsel and shall [fol. 32] be protected in any action taken or omitted to be taken in accordance with and in reliance upon the opinion of counsel. The Trustee is authorized to pay out of the

income received from the trust estate, or out of principal if the income should not be sufficient therefor and for necessary living expenses of Mary M. C. Atkins at the same time, any and all taxes which may be properly assessed against the trust estate or any beneficiary thereof. The Trustee may exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and may use such portion of the principal of the trust estate as may be necessary therefor or in the discretion of the Trustee, may sell any such rights for the benefit of the trust estate. The investments made through the exercise of any such rights shall be considered principal. The Trustee may cause any stocks or securities at any time held in trust, to be registered in the name of the nominee or nominees of the Trustee. The Trustee may compromise, adjust, settle and compound on such terms as may seem advisable to it in its discretion, any claims in favor of the trust estate or against the trust estate. The Trustee may make distribution of the trust estate in kind or in cash, or partly in kind and partly in cash, and the determination of the Trustee as to the fairness and equality of any such distribution shall be conclusive upon all persons entitled to receive any share of the trust estate. The trustee shall not be required to furnish any bond or security for the performance of its duties hereunder.

The Trustee shall be entitled to receive, as compensation for its services in the administration of the trust, a commission of two per centum (2%) per annum upon all [fol. 33] income received by it, and upon the death of the survivor of the Grantor and the Grantor's wife a commission of one per centum (1%) upon the market value of the trust estate.

During the lifetime of the Grantor, the Trustee shall, except in case of emergency or during the absence or disability of the Grantor, consult with the Grantor in reference to the sale or other disposition of trust property or the investment or reinvestment of trust funds.

X. This indenture shall be construed according to the laws of the State of New York, where it is made and where it is to be enforced.

In witness whereof the Grantor has hereunto set his hand and seal, and the Central Hanover Bank and Trust Com-

pany has caused these presents to be executed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, the day and year above written.

George W. E. Atkins, (L. S.) Central Hanover Bank and Trust Company, by S. A. Brown, Vice-President, (Corporate Seal.) C. J. Farrell, Assistant Secretary.

[fol. 34] State of New York,
County of New York, ss:

On this 16 day of May, 1929, before me personally came George W. E. Atkins, to be known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

S. A. Collins, Notary Public. Notary Public Bronx Co. No. 74 Reg. No. 3071. Cert. filed in N. Y. County No. 418 Reg. No. 0-305. Cert. filed in Westchester County. Commission expires March 30th, 1930.

State of New York,
County of New York, ss:

On this 16 day of May, 1929, before me personally came S. A. Brown, to me personally known, who being by me duly sworn, did depose and say, that he resides in Leonia, N. J.; that he is a Vice-President of Central Hanover Bank and Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation and that he signed his name thereto by like order.

S. A. Collins, Notary Public. Notary Public Bronx Co. No. 74 Reg. No. 3071. Cert. filed in N. Y. County No. 418 Reg. No. 0-305. Cert. filed in Westchester County. Commission expires March 30th, 1930.

[fol. 35] SCHEDULE A

$10,000. N. Y. Title & Mortgage Co. Gtd. 1st Mtge. Ctf. 2284 S F-1, 5½% 5/1/1939 M & N 1	$10,500. Carolina Power & Light Co. 1st & Refg. Mtge. 5% 4/1/1956 A & O 1
$ 5,000. American Ice Co. S/F Gold Deb. 5% 6/1/1953 J & D 1	$10,000. Chi. Ind. & Louisville Ry. Co. Ref. 6% 7/1/1947 J & J 1

In addition to the above, there are 60 items of similar domestic securities enumerated, with a par value of $389,800.00, and one foreign, to wit, Paris-Orleans R. R. Co. 6% 1956, having a par value of 27,000 francs.

[fol. 36] PREROGATIVE COURT OF NEW JERSEY

ANALYSIS OF TAX

STATE OF NEW JERSEY
STATE TAX DEPARTMENT
TRANSFER INHERITANCE TAX BUREAU

ASSESSMENT

Estate of George W. E. Atkins of Essex County
Late Resident of East Orange. Date of Death November 9, 1936

Amount of Estate	Real	$		
	Personal	216,802 88		
	Transfers	405,600 34	TOTAL	$622,403 22
Debts, Expenses, &c				20,937 04
Net Taxable Estate				601,466 18
Exempt Interests				10,000 00
Taxable Interests				591,466 18
Tax			1-2-3-4-5-6%	$ 19,998 05

Will and transfers to take effect at death.

ANALYSIS OF TAX

	Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Age	Exempt	Taxable
	Payment of debts George C. Atkins.		Son		$5,000 00	$293,991 86
W 1	Specific bequest—stock	$6,187 74				9,899 59
	Gifts to take effect at death as follows:					
	½ corpus of trust fund under deed dated 5/16/29	188,458 52				
	½ commuted value of (Equitable) policies #9,142,731, 9,260,836 & 9,545,296 and (N. Y. Life) policy #303,553	10,367 88				
	Commuted value of (Equitable) policy #8,948,433	4,138 67				
W 2	½ Residue	89,839 05				
		$298,991 86				

(Rubber Stamp)
Assessment Dated 2/11/38
Assessed by H. E. ROWLEY
Re-Audited by

[fol. 37]

STATE OF NEW JERSEY

STATE TAX DEPARTMENT

TRANSFER INHERITANCE TAX BUREAU

ASSESSMENT

Estate of George W. E. Atkins of Essex County
Late Resident of East Orange. Date of Death November 9, 1936
Will and transfers to take effect at death.

ANALYSIS OF ESTATE

Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Age	Exempt	Taxable
John M. Atkins		Son		$ 5,000 00	$297,474.32
W 1 Cash	$ 10,000 00				10,098.46
Gifts to take effect at death as follows—					
½ corpus of trust fund under deed dated 5/16/29	188,458 52				
½ commuted value of (Equitable) policies #9,142,731, 9,260,836 & 9,545,296 and (N. Y. Life) policy #303,553	10,367 88				
Commuted value of (Equitable) policy #8,877,293	3,808 87				
W 2 ½ Residue	89,839 05				
	$302,474.32			$10,000 00	$591,466.18
					$ 19,998.05

COMPUTATION OF TAXES

George C. Atkins		John M. Atkins	
$ 5,000 00 Exempt		$ 5,000 00 Exempt	
45,000 00 @ 1%	$ 450 00	45,000 00 @ 1%	$ 450 00
50,000 00 @ 2%	1,000 00	50,000 00 @ 2%	1,000 00
50,000 00 @ 3%	1,500 00	50,000 00 @ 3%	1,500 00
50,000 00 @ 4%	2,000 00	50,000 00 @ 4%	2,000 00
98,991 86 @ 5%	4,949 59	100,000 00 @ 5%	5,000 00
		2,474 32 @ 6%	148.46
$298,991 86	$ 9,899 59	$302,474 32	$10,098 46

[fol. 38] PREROGATIVE COURT OF NEW JERSEY

In the Matter of THE STATE OF NEW JERSEY INHERITANCE TAX ON THE ESTATE OF GEORGE W. E. ATKINS, Deceased

AFFIDAVIT OF C. L. HERTERICH

C. L. Herterich, being duly sworn deposes and says: That he is an Assistant Vice President of Central Hanover Bank & Trust Company, one of the executors of the Estate of George W. E. Atkins, deceased, who died November 9, 1936, a resident of the County of Essex, State of New

Jersey, and his will was admitted to probate in the Surrogate's Court, County of Essex, State of New Jersey, on December 10, 1936, wherein George Chew Atkins, John Norton Atkins and Central Hanover Bank & Trust Company were appointed and duly qualified as executors of his Estate;

That an affidavit with schedules annexed was filed with the Transfer Inheritance Tax Bureau, State of New Jersey, for the purpose of the assessment of whatever State of New Jersey Inheritance Tax might be due by the said Estate;

That attached to said affidavit and schedules was a copy of a trust agreement dated the 16th day of May, 1929 between George W. E. Atkins, then residing in East Orange, N. J., Grantor, and Central Hanover Bank & Trust Company, a banking corporation organized and existing under the laws of the State of New York, Trustee, together with a statement of securities composing the assets of the trust fund on the date of its inception, as well as a statement of cash additions to the trust fund;

[fol. 39] That the said trust agreement was duly executed by the said George W. E. Atkins and Central Hanover Bank & Trust Company in the State of New York;

That Paragraph 3 provided "this indenture shall be construed according to the laws of the State of New York where it is made and where it is to be enforced";

That the majority if not all of the securities which composed the assets of the trust fund on the date of its inception, May 16, 1929 had previously been held in a safekeeping account in the name of George W. E. Atkins with the Central Hanover Bank & Trust Company, and that the said safekeeping account of the said George W. E. Atkins was opened with the Central Union Trust Company, the predecessor of Central Hanover Bank & Trust Company, on or about the 15th day of May, 1924 and had been continuously used by the said George W. E. Atkins until the creation of the said trust agreement whereby all of the securities in said safekeeping account were transferred to the Central Hanover Bank & Trust Company as trustee under the agreement dated May 16, 1929;

That the said securities were at all times physically held by said Central Hanover Bank & Trust Company within the City and State of New York, both while in said safekeeping

account and thereafter while constituting part of the assets of the trust fund.

C. L. Herterich.

Sworn to before me this 8th day of April, 1938. J. Rown Koeppe, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 644, Reg. No. O-K-380. Cert. filed in Bronx Co. Reg. No. 137-K-40. Cert. filed in Niagara County. Commission expires March 30, 1940.

[fol. 40] PREROGATIVE COURT OF NEW JERSEY

SUPPLEMENTAL AFFIDAVIT OF C. L. HERTERICH

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

C. L. HERTERICH, being duly sworn, deposes and says:

That he is an Assistant Vice-President of Central Hanover Bank and Trust Company, one of the Executors of the above named decedent; that he has heretofore made an affidavit herein, sworn to the 8th day of April, 1938, with respect to the trust agreement dated May 16, 1929 entered into between the decedent and said Central Hanover Bank and Trust Company; and that he now makes this supplementary affidavit for the purpose of giving further details with regard to the administration of the trust created by said trust agreement.

That since the execution of said trust agreement, which took place in the City and State of New York, not only have the assets constituting the trust fund been at all times physically held within the State of New York, as set forth in said prior affidavit, but the trust with respect to the same under said agreement has been at all times wholly administered and carried on within the State of New York, namely, at the office of the Trustee, the said Central Hanover Bank and Trust Company, at 70 Broadway, in the Borough of [fols. 41-82] Manhattan, City and State of New York. All decisions and directions of the Trustee with respect to the trust have been made in the City of New York; all investments and changes of investments were made in said City;

all books and records pertaining to the trust fund have been kept in said City; the office of the Trustee in said City was given as the address of the Trustee on the books of the various corporations in which stock has been held; all dividend checks were received and all bond coupons were defached from their respective bonds in said City and the same deposited for collection in said City; all payments of income to the beneficiary-grantor have been made at or from the office of the Trustee in said City; and no acts with respect to said trust agreement have at any time been performed by the Trustee within the State of New Jersey.

C. L. Herterich.

Sworn to before me this 27th day of June, 1938. J. Rowan Koeppe, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 644, Reg. No. O-K-380. Cert. filed in Bronx Co. Reg. No. 137-K-40. Cert. filed in Niagara County. Commission expires March 30, 1940. (Seal.)

[fol. 83] New Jersey Prerogative Court

[Title omitted]

Conclusions—Filed February 14, 1941

Transfer Inheritance Tax Appeal on Final Hearing

Messrs. Child, Riker, Marsh & Shipman, for appellants.

Mr. David T. Wilentz, Attorney General.

Mr. William A. Moore, Assistant Attorney General, for respondent.

Buchanan, *V.-O.:*

This is an appeal from the transfer inheritance tax levied in the estate of George W. E. Atkins, deceased, who died [fol. 84] testate, domiciled in this state, November 9, 1936. Tax was assessed against the transfer under his will of property valued at a little less than $200,000; also against the transfer of property passing under an *inter vivos* trust deed executed and delivered on May 16, 1929; and also against transfers made to decedent's two sons under cer-

tain "refund annuity" agreements between decedent and certain respective insurance companies.

There is no dispute as to the tax on the testamentary transfers, nor as to amounts or computation as to the other transfers; the only questions in issue are (1) the taxability of the transfers under the trust deed, and (2) the taxability of the transfers under the refund annuity agreements.

The Refund Annuity Transfers

First as to the transfers under the refund annuity agreements. There were six of these agreements, or "policies," with two insurance companies, all essentially alike, purchased in the period between July, 1932, and October, 1935. The decedent paid a lump sum, called the "capital investment", to the insurance company and received in consideration thereof an agreement whereunder the company bound itself to pay to the annuitant certain fixed, equal, monthly payments during his life, and if the annuitant should die before receiving monthly payments aggregating the amount of the "capital investment", to continue the monthly payments after his death until the total of said payments equalled the amount paid in; the payments, (if any), subsequent to Mr. Atkins' death were to be made to his two [fol. 85] sons, as beneficiaries designated by Mr. Atkins; and the right was reserved to Mr. Atkins to change the said beneficiaries during his life.

It seems clear that the transfers to the two sons, under these contracts, are gifts *inter vivos* "made in contemplation of the death of the donor"; and they are also gifts "intended to take effect in possession or enjoyment at or after such death." Under our statute they are therefore taxable in either of those aspects.

That these are, in substance and effect, transfers by the decedent, although the actual payments to the sons are to be made by the insurance company, is obvious. The payments (if any) to be made to the sons, constitute repayment by the company of the equivalent of so much of the capital sum invested by decedent as has not previously been repaid to the decedent himself. That which is to be paid by the company to the sons is in substance and effect, simply that which the decedent has paid to the company and directed the company to pay to the sons. If otherwise taxable, these transfers are not saved from taxability because made

through the medium of a third party. *In re Gemmell*, 123 N. J. Eq. 315, and cases cited at page 321, 197 Atl. Rep. 428.

By the express terms of the contracts the sons take nothing thereunder until the death of the annuitant grantor; that which comes to them comes only at and after his death. It is a supererogation to say that these gifts were intended by decedent to take effect in possession or enjoyment at or after his death. He intended that which he expressly provided.

It is equally clear that these (contingent) gifts to the sons were made by the donor in contemplation of his death. [fol. 86] It may be conceded that he had no apprehension of death other than as an event certain to occur at some time in the indefinite future. A transfer is taxable under that clause, however, if made in and because of such contemplation of death as that which leads to testamentary disposition—if made with the intent and purpose that it be in lieu of testamentary disposition. *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 800; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235.

That these transfers to the sons in the instant case were made in lieu of testamentary disposition is indisputable; they are specifically, expressly and solely, provisions as to the *post mortem* disposition of a part of the assets of his estate—the value, at his death, of the unpaid instalments under the contracts.

Appellants contend that these transfers are not taxable because the primary purpose and motive of the decedent in taking out these contracts was to make provision for himself for life, not to provide a distribution of his property after his death.

If this contention were sound it would of course be of no practical benefit to appellants, for it still would remain true that the gifts would be taxable as being intended to take effect in possession or enjoyment at or after death. However it is not sound, and hence not efficacious to preclude taxability of the gifts as made in contemplation of death.

As pointed out, and held, in *Nicholas* v. *Martin*, *supra*, it is not a requisite of taxability on this ground, that the transferor's primary object and purpose in making a [fol. 87] transfer which is in fact made and intended as in

lieu of a testamentary disposition, should have been to make provision for the *post mortem* distribution of his estate (or a part thereof); it is sufficient if he in fact, regardless of what may have been his primary object in so doing, makes a transfer which is in fact made and intended as in lieu of a testamentary disposition.

Moreover, in the instant case, this contention of appellants is unsound, because we are here concerned not with the provision for repayment from the company to the annuitant during his life, but simply with that part of the transaction which provides for the contingent, eventual *post mortem* payment to the sons. It is only this latter transfer which has been taxed. If the contract had not contained this provision, but had instead provided that any portion of the capital investment which had not been repaid to the annuitant during his life, should at his death be paid to his estate,—his executors or administrators,— there would have been no taxable transfer in and by the contract. In that case such unrepaid balance would pass under his will and be taxable as a testamentary transfer. The decedent however did not so provide: instead he made a conscious choice between such provision and a provision for *post mortem* distribution to his sons, decided in favor of the latter, and acted accordingly—thus making, by this provision of the contract, a transfer intentionally in lieu of testamentary disposition,—taxable as made in contemplation of death under the established intent and meaning of the statute.

Appellants rely on the principle, set forth in such cases as *In re Kellogg*, 123 N. J. Eq. 322, 197 Atl. Rep. 263, (and the cases therein cited on p. 325), that where a transferor [fol. 88] makes *inter vivos* an absolute, immediately effective transfer of property in exchange for an agreement by the transferee to pay an annual sum to the transferor during the transferor's life, the transfer is not taxable (under the "intended to take effect at death" clause), unless the annual sum to be paid to the transferor comes from or is connected with or dependent upon the corpus or income of the actual property transferred.

That principle, and those cases, obviously have no application here. Those cases deal with the taxability of a transfer from the transferor to the original transferee where the transferor retains or receives back something which is similar to the beneficial enjoyment, dur-

ing his life; of the property transferred,—thus raising the question as to whether or not the transferor intended the ultimate transfer of actual beneficial enjoyment to the transferee to take place only at or after the transferor's death. They do not involve any promise by the transferee to pay over or transfer something *to a third party at the transferor's death*. The present case does; and the thing which the transferee agrees to pay over to the third party is a part of, or "identifiably tied up with", and dependent upon, the property transferred by the transferor to the original transferee.

The present case is in effect, (insofar as concerns that portion of the original transfer which is not repaid to the transferor during his life), a (contingent) transfer, through an intermediary, to the third party to take effect only at the transferor's death.

The situation is no different as to taxability even if it be deemed that the sum or amount which the insurance [fol. 89] company agreed to pay to the sons, is not actually a part of, or identifiably tied up with, the thing transferred by the annuitant for the insurance company. The transferor, under the agreement of the insurance company, had a right to have repaid to himself or to his estate, the amount of the capital investment in equal annual payments,—because there was reserved to him the right to change the *post mortem* beneficiaries. That right, at the moment of the transferor's death, was of the value of the balance then remaining unpaid; and that right (and the value thereof) actually ultimately passed to the two sons only at the annuitant's death,—because he had not until then lost the right to revoke the beneficence to the son. *Cf. Kings County Trust Co.* v. *Martin*, 124 N. J. L. 290, 2 A. 2d 187; *Graves* v. *Elliott*, 307 U. S. 383.

This also disposes of the contention put forward in appellants' brief, to the effect that the interest passing to the sons is not taxable because its passing to them was only contingent, and that, under the mortality tables and their father's age and expectancy of life, the value of their expectancy of receiving anything thereunder was *nil*, at the time their father made the agreements.

Irrespective of all this of course, the transfer to the sons is still taxable as made in contemplation of death.

Appellants further contend that these transfers to the sons are not taxable, because (they say) proceeds of life

insurance policies passing to named beneficiaries are exempt from taxation and because these annuity agreements are (they say) life insurance policies. In that contention this court cannot concur. The applicable statutory pro-
[fol. 90] visions are those found in R. S. 54:34-4, *b* and *c*: (subsections *f* and *g* were not passed until 1939).

These statutory provisions for exemption existed in precisely the same form prior to the Revision of 1937, and were in force and effect during the period of the making of the annuity agreements in question, and also at decedent's death. They are not, however, applicable to the situation *sub judice*, because this situation does not involve any trust deed, trust agreement or trust fund, and especially it does not involve any trust fund resulting "from the proceeds of contracts or insurance * * * insuring the life of decedent and payable at or after the death of decedent to the trustee" under such trust agreement.

Not only do the contracts under consideration create no trust fund, nor provide for any payment to any trustee nor for the benefit of any *cestui que* trust, but they are not even "contracts of insurance * * * insuring the life of decedent."

It may be assumed for the sake of argument that the transfer to named beneficiaries, of proceeds of life insurance policies, would not be taxable, even though under such policies the insured retained the right to change the beneficiaries—*Cf. In re Gemmell*, 123 N. J. Eq. 315, 197 Atl. Rep. 428, at pages 319 *et seq.*; but the contracts in question are not life insurance policies. A life insurance policy is a contract whereby the insurance company agrees to insure or indemnify the beneficiary against the death of the insured; it is a contract by which the insured protects the beneficiary against loss accruing by the early or premature death of the insured. The refund annuity contract such as we are here considering is very different. By it the insurance company agrees to repay to the annuitant, in
[fol. 91] instalments during his life, the amount paid in by him to the company, and if at his death there be a balance unpaid to him, to pay that balance to the person designated by the annuitant to receive the same. It is a contract by which the annuitant protects *himself, during his life*, by making an investment which will assure the receipt *by himself*, of an adequate or desired annual sum during his

life, with the further assurance that if he should die prematurely, his estate or those whom he desires to receive distribution thereof, will not suffer the loss of the repayment he has himself not yet received. In the judgment of this court this is not a life insurance policy.

The question is *res nova* in this state. There are authorities *pro* and *con* in other jurisdictions, but those in accord with the conclusion herein reached are deemed to have the support of better logic and reason.

Reference is made by appellants to the fact that the amounts passing to the sons under these agreements, constitute only a small part of decedent's estate. If by this it is meant to suggest that the transfers are for that reason not taxable, the suggestion is unsound. The statute provides that transfers *inter vivos* of a material portion of the transferor's estate, under certain circumstances shall be *prima facie* deemed to have been made in contemplation of death. But there is no provision, express or implied, which says that a transfer which is in fact made in contemplation of death or intended to take effect at or after death, shall not be taxable unless it be of a material portion of the transferor's estate. Moreover, the transfers to the sons in the instant case aggregate some $28,600.—a sum which is by no means *de minimis*, either actually or [fol. 92] in relation to the assets of approximately $200,000. at that time owned by decedent.

The Trust Deed Transfers

Next as to the taxability of the transfers under the deed of trust. This deed was executed and delivered by decedent on May 16, 1929, in the State of New York. Admittedly the entire property conveyed thereby consisted of intangible personality, the legal title to which, and the beneficial ownership of which, was in the grantor, who was then and for a considerable time prior thereto had been, a domiciled resident of New Jersey. The "securities" or paper evidence of ownership of this intangible personality were at that time, and for some time previously, and at all times subsequently until the death of decedent, physically located in the State of New York. Prior to the making of the deed they had been in the custody of an agent of said owner. The trustee was a corporation of, and having its office in, the State of New York. The trust deed

provides by its express terms that it is to be construed according to the laws of the State of New York. Decedent, grantor of the trust, continued to be domiciled and resident in New Jersey at all times subsequent to the execution and delivery until and at the time of his death.

The trust deed provided, in essence, for an equitable life estate to the grantor for life, and thereafter to his wife for life (if she survived him), and that the corpus in remainder be paid to the grantor's two sons if living—with substitutionary gift over in case of their prior death. The wife predeceased the grantor; the two sons both survived him.

[fol. 93] The tax levied and assessed with respect to the transfers under this deed of trust, and as to which the present appeal is taken, was as to the transfers of the remainder interests to the two sons.

The specifications of alleged error, or the grounds of this appeal, as set forth in the petition of appeal, may be more succinctly set forth as follows:

The property which comprised the trust fund was located outside the territorial limits of New Jersey at the time of execution of the trust deed; the trust deed was executed outside of New Jersey; the legal title to the property transferred by that deed was transferred to a corporation domiciled in New York; the legal title to the property and the possession thereof has at all times since remained in that trustee entirely outside of New Jersey; and under these circumstances

a. the transfer of the trust property is not made taxable under the provisions of our statute.

b. the state of New Jersey had no constitutional power to tax the said trust property because the *situs* thereof at the time of taxation was not within the territorial limits of this state.

c. if the provisions of our statute authorize or direct the taxation of the property of the trust fund, then such provisions and such taxation are unconstitutional, because a state has no power or jurisdiction to tax property, or the transfer of property, when such property is located, or such transfer is made outside the limits of its own territorial boundaries.

[fol. 94] Not much time need be spent in considering b. above—inasmuch as no tax was here imposed on the *property*. The tax appealed from was imposed upon the *transfer* of certain interests in property.

Moreover, even if the tax had been imposed on the property itself (presumably, appellants mean the property which was conveyed by the grantor to the trustee), the allegation is unsound. That property was admittedly *intangible* personalty; and the power to tax such property inheres in the state of the domicile of the owner thereof. *Curry* v. *McCanless*, 307 U. S. 357, at 368, and 370.

As to a., above—reference to the provisions of the statute will show that this allegation—(that the statute does not purport to impose a tax such as that here *sub judice* in the situation and circumstances present in the instant case)—is without foundation. On the contrary, such a transfer clearly comes within the scope of the express terms of subsection first, of section 1, of the statute in force and effect at the date of the transfer and the date of the transferor's death—P. L. 1909, C. 228, p. 325, as amended. (It is also to be noted that it comes within the scope of the express language of the corresponding sections of the present statute—R. S. 54:34-1 c. and d.)

The statute (see section 1 thereof) expressly imposes tax, *inter alia*, upon every transfer of any property of the value of $500, or of any interest therein or income therefrom, made by a resident, by deed made in contemplation of the grantor's death or intended to take effect in enjoyment at or after such death. Under the express words of the statute therefore, the tax is imposed on the transfers made by the present deed of trust, because that deed [fol. 95] was made by a resident of New Jersey; it transferred to the trustee property of the value of over $500, and also transferred to the two sons contingent equitable interests in remainder in that property (which interests were also of the value of over $500); and these transfers of the equitable interests to the two sons were made by deed made in contemplation of the grantor's death and also they were intended to take effect in enjoyment or possession at or after such death.

That these transfers to the sons were intended to take effect in possession or enjoyment at or after the grantor's death is obvious; the trust deed expressly so provides, and hence necessarily intends. That they were made in con-

templation of the grantor's death is equally beyond doubt. The grantor was aged 79 at the time he made the deed; the deed provides for the *post mortem* distribution of the trust fund; the trust fund comprised some $390,000 or approximately two-thirds of his estate; and the deed was executed contemporaneously with the execution of his will which provides likewise for the *post mortem* distribution of the bulk of his testamentary estate to the wife for life with remainder to the sons. See *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd, 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 800; aff'd, sub nom. *Hartford* v. *Martin*, 122 N. J. L. 283, 4 A. 2d 31; *In re Fischesser*, 14 N. J. Misc. 815, 187 Atl. Rep. 648; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235. The nature of these transfers is at least tacitly admitted by appellants; who likewise do not controvert the proper appraisal, computation and levy of the tax, if the transfer is constitutionally subject to the operation of the statute. [fol. 96] It must needs also be admitted by appellants,—and indeed they do not contend otherwise,—that there is nothing in the provisions of our statute which expressly or impliedly exempts from taxation, such transfers as the one here under consideration.

The real contention of appellants is that the transfers by the trust deed are not subject to the taxing power of New Jersey because that deed and the transfers thereby made were made and took place outside the territorial boundaries of this state; were made to a non-resident trustee; by a deed which expressly provided it should be construed according to the laws of New York; and the property transferred was then, and at all subsequent times, outside the territorial boundaries of this state; further, that the transfers of interest to the sons did not take place until the death of the grantor, inasmuch as the interests given to the sons were contingent upon the sons surviving the grantor, and until his death leaving them surviving, no gift vested in them; that at grantor's death he was not the owner of the property conveyed by the trust deed, (legal title to which was then in the New York trustee); hence New Jersey could not validly impose a tax upon that transfer at the grantor's death, notwithstanding the statute purports so to do.

The power of a state to impose a tax upon property, or upon the owner of property, rests upon the dominion and control of that state over that property or over the

owner. See *Curry* v. *McCanless*, 307 U. S. 357, at page 366.

Although there is of course a difference between a tax on property and a tax on the transfer of property, that difference is not material on this matter of sovereignty based [fol. 97] on control. A state which by reason of physical control over property within its borders, has the power to tax that property, must equally have power to tax the transfer of such property, because by reason of its physical control, it can (except as forbidden by the federal constitution), impose conditions upon, or prescribe the methods necessary to accomplish, or even *forbid* completely, the transfer of that property. *Cf.* statutes forbidding the ownership of real estate by aliens, or by foreign corporations, and the like; also the statutes prescribing necessary requisites for accomplishing conveyance, by will or by deed, of property within the state's borders.

Since it is the state in which the property is situate which has the power and right to prescribe the requisites for accomplishing a transfer of that property, it seems clear that if that state does not include among such requisites some provision as to the place *ichere* that act of transfer must necessarily be made in order that the transfer be valid and effectual (assuming that such a provision would be constitutional) it is utterly immaterial where that act of transfer is performed so long as it complies with such other requisites as the state of *situs* has prescribed. Conveyances of real property in New Jersey are constantly made both by deeds executed outside of this state and by wills of decedents who are non-residents of New Jersey, and no one has ever suggested that their validity might be open to question because they were not made in the state of New Jersey; on the contrary, that their validity is not subject to question on that ground is indicated by the statutory provisions for the recording in this state of foreign wills and [fol. 98] for the taking of acknowledgments in foreign states of deeds conveying New Jersey real estate, and the like.

Inasmuch, then as New Jersey, having the power to prescribe the methods and requisites necessary to accomplish a valid transfer of property within its borders, and the power to tax such a transfer has not included in the necessary requisites for effectuating a valid transfer any requirement that the act of transfer must be performed within this state, it follows that an act of transfer performed outside this state, if it in all other respects com-

plies with such provisions as New Jersey has made requisite to effectuate a valid transfer, does accomplish a valid transfer and a statutory tax imposed by New Jersey upon transfers of property located in this state will apply to and be operative upon that transfer just as much as on a valid transfer effectuated by an act performed in New Jersey.

Therefore the fact that in the instant case the act effectuating the transfer was performed in New York, by the execution and delivery there of the trust deed, is a matter of no moment so far as concerns the validity of the tax. No constitutional provision is cited, or known, which would make it requisite to the validity of a tax imposed by New Jersey upon the transfer of New Jersey property, that the act of transfer must take place in New Jersey; our taxing statute provides for no such limitation; there appears no logical reason, nor any reported adjudication by the courts of this state or of the United States, to support the contention that such a limitation should be inferred. The only authority proffered by appellants in support of their contention in this behalf, is the case of *Cutts* v. *Najdrowski*, [fol. 99] *123 N. J. Eq. 481, 198 Atl. Rep. 885, and the case of *MacClurkan* v. *Bugbee*, *106 N. J. L. 192, 150 Atl. Rep. 443—but neither of these cases in fact affords any such support.

In the *MacClurkan* case, a deed of trust, irrevocable for five years, was made in Illinois by a grantor who then resided in Illinois, which comprised no property located in New Jersey. The question before the court was as to the validity of a transfer tax by this state on the transfer made by a non-resident, of a contingent interest which became vested at the death of the grantor, the grantor having meanwhile become a resident of New Jersey and died within the five-year period of irrevocability. Since the deed when made comprised no property located in New Jersey it did not come within the scope of the provisions of the New Jersey statute relating to tax on transfers made by non-residents. It was held that it also did not come within the scope of the provisions for the taxation of transfers by residents, because the trust deed when made was made by a non-resident, who, though she later became a resident, never had any power or control over the transfers provided in that deed, and although the contingent life estate vested while she was a resident, it did so by reason of the deed of trust made when she was a non-resident, and not by rea-

son of any act or failure to act by the grantor while such resident, and not because of any privilege granted, or power of nullification withheld, by the state of New Jersey. It is clear therefore that, notwithstanding the opinion includes considerable discussion as to the circumstances in which a state has the constitutional right or power to impose a transfer tax, the decision does not in any wise hold, and [fol. 100] cannot be deemed authority for the principle that, a transfer of property located in this state, made by an owner domiciled in this state, cannot validly be taxed by this state if that transfer is made in another state.

In the other case cited by appellants—*Cutts* v. *Najdrowski*, *supra*—the factual situation was that L., a New Jersey resident, who owned a bank deposit standing in his name in a New York bank, caused the account to be changed to the credit of "L. in trust for J." The question was whether this act of L. constituted or accomplished a valid transfer to J. of the ownership of the account. The actual decision was that under the law of New York it did constitute such valid transfer; and that the question of the determination of the nature, validity and effect of the transaction was one which was governed and controlled by the law of the State of New York. It does not appear from the opinion *what* the act of transfer was, nor—except by possible implication—that it *was* made in New York; and it is not clear from the opinion whether the reason for holding that the law of New York controlled was because the act of transfer was made in the State of New York, or because the court found that the property transferred (notwithstanding it was intangible—a chose in action), had a *situs* in New York; or both. All this however is immaterial. So far as concerns our present inquiry, the decision does not in any wise hold nor purport to hold that the State of New Jersey did not have the power to tax that transfer—does not have the power to tax a transfer of intangibles owned by a New Jersey resident where the act of transfer is performed in New York. The most that it holds is that the nature, effect and validity of an act of transfer performed in New [fol. 101] York is to be determined by the law of New York.

Applying that holding to the instant case simply means that the nature, effect and validity of the trust deed here being considered, is to be determined by the law of New York (where it was executed and delivered). There is

however no controversy as to the nature, effect or validity of the deed. Concededly it was a valid deed and comprised and effected a transfer of the legal title to the trustee and transfers of the equitable interests to the beneficiaries as therein specified. (No proof was in fact made as to the law of New York in this regard, and hence it is presumed that that law is the same as the law of this state.) The question here is whether those transfers made by an owner-grantor domiciled in New Jersey, are beyond the power of New Jersey to tax, simply because they were made in New York. The *Cutts* case is in nowise authority one way or the other.

(In *Hasbrouck* v. *Martin*, 120 N. J. Eq. 96, 183 Atl. Rep. 735, cited by respondent, there was no question raised by the parties nor considered by the court as to the power of this state to impose the tax. It cannot therefore be deemed authority one way or the other, as to the present dispute.)

On the other hand, in *Carr* v. *Edwards*, 84 N. J. L. 667; 87 Atl. Rep. 132, a tax was levied by New Jersey in respect of the testatmentary transfer of the estate of a non-resident testator which included stocks in New Jersey corporations, and it was held that the law of New Jersey controlled the right of succession to such property of a Massachusetts decedent as had its *situs* in this state, and that our transfer inheritance tax act intended to, and did, tax that transfer of that property. It is a determination therefore, by our [fol. 102] highest court, that the state of the *situs* of property has the right to tax the transfer of such property, notwithstanding that the act effectuating transfer, (in the *Carr* case the Massachusetts will) occurs outside of this state. In the instant case the act of transfer (the execution of the deed of trust) occurred in New York but the property thereby transferred (being intangible personal) had its *situs*, as we have seen, in the domicile of its owner—New Jersey.

A final and controlling authority on this point is the determination of the United States Supreme Court in *Curry* v. *McCanless*, *supra*. The court there said (p. 366), that the jurisdiction of a state to impose upon the owner of intangibles a tax on the use and enjoyment of rights therein, measured by their value does not depend on *any factor other* than the domicile of the owner within the taxing state; and again (p. 370) that inasmuch as the state of domicile of

the owner of intangibles may lawfully tax such intangible property in the hands of such owner, "we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state." This obviously excludes any necessity that the act of making the transfer must be performed in the taxing state. It can make no material difference in this regard whether the act of transfer be by will or by deed.

It is deemed therefore that the fact that the deed of trust in the instant case was executed and delivered in New York, constitutes no ground for holding the present tax invalid.

There is no greater force to the contention of appellants that the present tax is invalid because of the fact that the [fol. 103] deed of trust was made to a trustee which was a corporation of New York and located and doing business solely in New York, and the transferees of the equitable interest were non-residents. The statute contains no such limitation, and no authority whatever is submitted by appellants. No logical basis for such a contention can be perceived.

Neither is it at all material to the present issue, that the deed of trust provides that it shall be construed according to the law of New York. The mere fact that the deed contains that provision does not deprive New Jersey of the power and right to tax the transfers therein provided. It might be that if, construed according to the law of New York, that deed was invalid or the transfers therein provided were invalid or were of a different nature and effect than if construed according to the law of New Jersey, the right of New Jersey to tax under the provisions of our present statute might be affected; but no such situation exists. There is no claim whatever that there is any difference under the law of New York, as to the validity, nature and effect of the deed of trust or the transfers therein specified, than under the law of New Jersey.

We come now to the contentions more strongly stressed by appellants—*i. e.* (a) that at the time the deed was made the property thereby transferred to the trustee was located outside the territorial boundaries of New Jersey, and so continued at all times thereafter, and hence New Jersey had no power to tax the transfers made by that deed; (b)

that the interests given to the sons were contingent and did not vest until the grantor's death, and hence that no transfer to the sons (being the transfer on which the present tax was [fol. 104] levied and assessed) took place until the death of the grantor; (c) that at the time of grantor's death he was not the owner of the property transferred by the trust deed and hence that property was not located in New Jersey and therefor New Jersey had no power to tax that transfer thereof.

First as to the *situs* of the property comprised in the trust deed, at the time of the making of that deed. That property, as has been said, was comprised entirely of intangibles—securities—owned, both as to legal title and beneficial interest, by the grantor, but the paper evidences of which were in the custody and possession of a New York corporation (the same one named as grantee in the deed), as agent of the grantor, and which had so acted as such agent for some considerable time, keeping them in safe custody, collecting the income for grantor and from time to time making sales and purchases as directed by the grantor.

It has been said in divers cases that the legal *situs* of intangibles, for the purpose of taxation, is the state of domicile of the owner—this on the basis of a convenient fiction by which, in analogy to the principles applicable to the taxation of tangibles, a physical *situs* has been attributed to intangibles which in fact do not have, and cannot have, a physical *situs*. The actual basis for taxation in respect of intangibles is the control over the owner thereof by the state in which such owner is domiciled—and the duty of such citizen to contribute to the support of the government of his state. But, whatever the theory, it is certainly firmly established that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner "a tax on the use and enjoyment of [fol. 105] rights in intangibles, measured by their value." *Curry* v. *McCanless*, *supra*, at pages 367, 366, 370. And this includes the right to tax the *transfer* of intangible property or of an interest therein, whether such transfer is effected by an act in that state of domicile or an act in some other state. *Id.*, page 370. *Hopper* v. *Edwards*, 88 N. J. L. 471, 96 Atl. Rep. 667, cited by appellants, of course could not prevail over *Curry* v. *McCanless*, *supra*, but in fact it is in nowise authority for the proposition that the state of domicile of the owner has no power to tax such

transfer where the paper evidences are located in another state. It decides, at most, (i. e. assuming that the property involved in the transfer there under consideration was intangible property) that New Jersey, where the evidences of the intangibles were located, could validly tax the transfer of the intangibles, notwithstanding the owner-transferor of the intangibles was domiciled in New York, and notwithstanding New York may have validly levied a tax on the same transfer. In other words, it decides that, under the circumstances of the instant case, New York can validly tax, but it does not decide that New Jersey cannot validly tax.

It has been held in a number of cases (see those cited in *Curry* v. *McCanless*, *supra*, at page 368) that where an owner of intangibles who is domiciled in one state but has carried on business in another state and in so doing "established a business *situs*" in such other state of some or all of his intangibles, tax may be imposed by the state of such "business *situs*" in respect of such intangibles. Appellants contend that such was in fact the situation in the present case—that the grantor had established prior to the [fol. 106] execution of the trust deed, a "business *situs*" in New York for the intangibles conveyed by that deed, so that they were taxable by New York and were not taxable by New Jersey. This contention is unsound.

In the first place it may be doubted that the evidence in this proceeding establishes that any such "business *situs*" had been acquired by any of the intangibles conveyed by the deed of trust, as to enable New York to tax. All that the evidence shows is that the paper evidences of ownership of the intangibles had been for some time prior to the deed in the physical possession of an agent of the grantor in New York, who had kept them in safe custody for the owner, collected the income, and from time to time made certain sales and purchases as such agent.

In any event, this same situation existed in the recent case (1939) of *Pearson* v. *McGraw*, 308 U. S. 313, and it was held that the state of domicile of the owner of the intangibles had constitutional right and power to tax a transfer of the intangibles made by the owner aforesaid. Obviously, then, it must have been deemed by the court either, (1), that the intangibles had acquired no such business domicile as to enable tax to be imposed by the state where the evidences of the intangibles were located, or, (2), that the state

of domicile could tax, notwithstanding the other state also had power and right to tax.

No case is cited by appellants, nor has come to attention of this court, holding that the state of domicile does not have power and right to tax where a "business *situs*" has been acquired by intangibles such as to give the state of that *situs* the power and right to tax. On the contrary, the Supreme Court of the United States says in *Curry* v. [fol. 107] *McCanless*, *supra*, at page 370, "This court has never denied the constitutional power of the trustee's domicile" (the trustee being the owner of legal title to intangibles) "to subject them to property taxation" and "we perceive no ground for saying that the Fourteenth Amendment forbids the state" (of that trustee's domicile) "to tax the transfer of it" (the intangible property) "or an interest in it * * *." And again, at page 368—"it is undeniable that the state of domicile is not deprived by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." The factual situation in that case was that an owner domiciled in Tennessee had conveyed to an Alabama trustee legal ownership of a trust fund of intangibles (for her own benefit for life) reserving to herself the power to dispose of the trust fund by her will—which she did. The court held that both Tennessee and Alabama had power and right to tax the transfers made by that Tennessee will.

Again in *Graves* v. *Elliott*, 307 U. S. 383, a Colorado citizen transferred intangibles to a Colorado trustee by deed of trust, reserving power to revoke. The grantor later became domiciled in New York and died without revoking. Colorado levied a tax on the transfer occurring at death (as of course Colorado might lawfully do, under the authorities hereinbefore mentioned—being the state of domicile of the owner of legal title to the intangibles). It was held that New York also might lawfully levy tax on the transfer which occurred at the death of the grantor consist- [fol. 108] ing of the relinquishment of the power to revoke—that right of revocation being a potential source of wealth to her and having the attributes of property, and being an interest owned by her which she transferred or relinquished at her death, she being then domiciled in New York.

Although it is thus held by the United States Supreme Court that there is no constitutional prohibition against such "double taxation," it may be noted that in the present instance New York has not sought to impose tax on the transfers here under consideration.

It is further to be noted that the highest court of this state has held that this state may validly impose a tax upon intangibles owned by a corporation domiciled in this state, notwithstanding those intangibles have acquired a "business *situs*" in another state. *Newark Fire Ins. Co.* v. *State Board &c.*, 118 N. J. L. 525, 193 Atl. Rep. 912; aff'd 120 N. J. L. 224, 198 Atl. Rep. 837. This decision was affirmed by the United States Supreme Court, 307 U. S. 313, but that court was equally divided as to the ground of affirmance. However the decision of our highest court, not overruled by the United States Supreme Court, is of course controlling here.

The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title in the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, and also a transfer, at the same time, of an equitable interest of contingent remainder therein, to the two sons. Under the authorities cited, New Jersey had the power and constitutional right to tax either or both of these transfers.

[fol. 109] The tax here appealed was levied and assessed on the transfers to the sons. Appellants say that these transfers, being contingent, did not occur until the happening of the contingency and that New Jersey had no right or power to tax them because at that time New Jersey was not the state of domicile of the owner of the intangibles—ownership of the legal title being then in the New York trustee.

It may be here stated that it seems clear that if the state of domicile of the owner-grantor of intangibles has the constitutional power to tax the transfer of the legal title to those intangibles, it must likewise have the power to tax the transfer of any lesser legal interest than absolute ownership, and to tax the transfer of equitable interests as well as legal interests therein. No logical basis for any differentiation in this regard can be perceived. If the transferor owns the complete and absolute, legal and equitable title in this intangible personalty (as he did in the instant case), then he owned each and every interest therein less than

the full and complete, legal and equitable title; and since the whole and complete ownership was that of intangible property, every lesser part or interest would also necessarily be intangible property, and the state of domicile of such owner-grantor can constitutionally tax the transfer of any partial legal or equitable interest in the intangibles just as well as it can tax the transfer of the complete legal and equitable title.

That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency is not true. It cannot be [fol. 110] controverted that there *was* a transfer of interest from the owner-grantor to the two sons; that it was made *by* the owner-grantor; and that the *only* act of the owner-grantor in making that transfer was the execution and delivery by him of the deed of trust. That deed was irrevocable, and after its execution and delivery there was no act by the grantor, and no failure to act by him, which in any wise, did, or could, have any operation or effect in effectuating or preventing the transfer. By the deed he made a transfer of the interest in remainder, and thereafter he had no control whatever over that interest. Thereafter that interest must necessarily vest, at his death, in one or other of the alternative contingent remainder-men—and that by operation of the deed which he had made. It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; but it is inescapable that *he* made the transfer; and that he made it *at and by* his execution and delivery of the trust deed; and that that execution and delivery was the *only* thing he did in making the transfer.

Since it must be conceded that a transfer to the sons did occur; that it was effected solely by the trust deed; that that deed was made solely by the owner-grantor; that from the moment that deed was executed and delivered, it and the transfers therein and thereby made were utterly beyond any and all power of the grantor to revoke, amend or in any wise control, it necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him at the time he executed and delivered the deed; and, since at that time he was domiciled in New Jersey, New Jersey has the right to tax that trans-

fer, notwithstanding the interest so transferred did not vest [fol. 111] in the particular beneficiary until the grantor's death.

At the time the grantor performed the only act (positive or negative) performed by him in the making of the transfer, he had the legal title to the intangibles, and he was domiciled in this state. But more than this—the transfers upon which the present tax has been levied were not transfers of the legal title; they were transfers of interests of equitable remainder, and those interests were intangible property, and hence their transfer was taxable in the state of grantor's domicile even if we should assume that the legal title to the securities was in the New York trustee. Suppose grantor had made a deed of trust conveying the legal title to the securities to the New York trustee in trust for himself, and had thereafter made a deed conveying the equitable remainder to the sons. That equitable remainder would have been intangible property owned by the grantor and would have been taxable either under a property tax or a transfer tax by the state of his domicile. This is precisely the situation, and basis for taxation, in those cases where a grantor has made a *revocable* deed of trust and died without revoking. In such case the grantor's right of revocation and re-acquiring the property constitutes property of the grantor—and obviously intangible property—a transfer of which occurs by the relinquishment or termination thereof at the death of the grantor without revocation. And where such a transfer (by relinquishment or termination) occurs at death, it is constitutionally taxable by the state in which the grantor is domiciled at death. *Kings County Trust Co.* v. *Martin*, *infra*; *Graves* v. *Elliott*, *supra*; *Curry* v. *McCanless*, *supra*.

[fol. 112] As a matter of fact the grantor continued to be domiciled in New Jersey at all times thereafter until his death—although it is deemed that this fact is not material. The grantor's domicile at the time of his death would be material if, and only if, he had reserved to himself any power of revocation or control over this equitable remainder interest (as in such cases as *Graves* v. *Elliott*, *supra*, and *Kings County Trust Co.* v. *Martin*, 121 N. J. L. 290, 2 A. 2d 187)—but this he did not do.

By the deed of trust he made an irrevocable transfer of the equitable remainder. Although the identity of the particular beneficiaries in whom it would invest was not speci-

fied and would not be known until his death, nevertheless it *must vest* in *some* of the contingent beneficiaries named in the deed (for the final, contingent, substitutionary remaindermen therein specified are the heirs at law and next of kin of the grantor). The interest must pass under and by the deed, therefore; it cannot pass under his will or by intestate succession. The transfer is therefore made by the deed.

New Jersey has the right to impose tax on that transfer, for the reasons hereinbefore stated; and New Jersey *has* imposed such tax, by the terms of our statute. It will be noted that the statute imposes the tax on the transfer of *any interest* in property, whether the property is situate within or without this state—where the transfer is made by a resident of New Jersey (and is by will, intestate succession or by *inter vivos* conveyance made in contemplation of death or intended to take effect at or after death). See the statute, § 1, first paragraph, and § 26. Also, in the case of an *inter vivos* (or testamentary) transfer comprising an estate or interest contingent or defeasible in character, the [fol.113] property in which such interest is created is to be appraised immediately upon the occurrence of the making of the instrument of transfer, although, the tax on the transfer of the contingent or defeasible interest is not to be levied and assessed until the happening of the contingency. See § 3. The tax is on the transfer at the time it is made, though it may be not payable, or even assessable until a later time. *Cf. Renwick* v. *Martin*, 126 N. J. Eq. 564, at pp. 578-9, 10 A. 2d 293; *Citu Bank Farmers Trust Co.* v. *Martin*, 127 N. J. Eq. 492, 13 A 2d 852; and *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587, 14 A. 2d 59.

Appellants rely upon the decision in *Carter* v. *Bugbee*, 92 N. J. L. 390, 106 Atl. Rep. 412, as establishing their contention that in the case of a conveyance of a contingent interest which does not vest until the death of the grantor, no transfer occurs until the happening of that contingency and the consequent vesting. That case dealt with the validity of a tax levied under our statute on a transfer of equitable interests in contingent remainder, made by a non-resident of this state in and by an irrevocable deed of trust, comprising shares of stock of New Jersey corporations. It is true that in that opinion it was said, (p. 393) that "there could be no transfer" of the title to the estate in contingent

remainder until the occurrence of the contingency—but the court was not there concerned with, nor considering, whether or not any taxable transfer, or taxable step in a transfer, occurred at and by the execution and delivery of the trust deed, and in all probability did not intend to say or to be understood as saying that no taxable transfer or step in a transfer occurred at and by the making of such [fol. 114] deed. Furthermore, even if the court did intend its statement to be taken literally and completely, such a broad statement was not necessary to the actual determination as to taxability there made. It was not necessary to go any further than to hold that the transfer did not become complete until the happening of the contingency and that that completion, or that transfer as and when so completed, constituted a transfer at the time of such completion which was taxable and intended to be taxed by the provisions of our statute relating to transfers by non-residents. Consequently so much of the statement in the *Carter* case as was not necessary to the decision there made, and as is contrary to the generally accepted principles of law, is to be regarded as dictum and not as controlling in the determination of the present case. *Catts* v. *Najdrowski*, 123 N. J. Eq. 481, at page 482, 198 Atl. Rep. 885.

Although the case of *MacClurkan* v. *Bugbee*, 106 N. J. L. 192, 150 Atl. Rep. 443, is not specific authority as holding that where transfers are made by deed of trust such as in the instant case, a transfer of the contingent equitable remainder occurs at the time of the execution of that deed, which is subject to the operation of our statute, it would seem that there can be little if any doubt, from what was said by the court in that case, that such would have been so held, if that had been the question then before the court.

The facts and conclusions in the *MacClurkan* case have hereinbefore been set forth in connection with another point in the argument, but it may be added here, in connection with the present point, that the decision holds that where an irrevocable trust deed is made conveying intangibles to a contingent beneficiary, the transfer (from the standpoint of [fol. 115] our tax statutes) is made at and by the execution of the trust deed and that if the grantor be not at that time a resident of New Jersey, there is no transfer made taxable under the terms of our statute, notwithstanding that at the time of the happening of the contingency which vests the

contingent remainder, such grantor has become and is domiciled in this state. It will be observed therefore that it is essentially in contradiction to the earlier case of *Carter* v. *Bugbee*, if that case is to be understood as holding that *no* transfer occurs until the happening of the contingency, where a contingent remainder is given by irrevocable deed of trust.

If the provisions of the deed of trust herein involved failed to specify a beneficiary for each and every possible contingency, so that there was a possibility that the gift of remainder might fail (because of failure to vest in *any* of the specified contingent beneficiaries), it might be argued that no transfer of that remainder occurred until the happening of the contingency; that until that time the vested ownership of that remainder continued to reside in the grantor and would never pass from him by operation of the deed unless at that time some one of the specified contingent beneficiaries was alive to take; that if at that time no such beneficiary were alive to take, the remainder would not pass at all by the deed but would pass by the grantor's will or by intestate succession. Perhaps, indeed, it might be argued that even under the actual provisions of the present deed, the ownership of the remainder remained vested in the grantor until the happening of the contingency, because there was no provision in that deed for any prior vesting—not even a defeasible vesting; that therefore no transfer—[fol. 116] because no completion of the transfer—occurred until the actual vesting at the death of the grantor.

But even if such a view be accepted, it still remains true that the equitable remainder interest was intangible property; and if it be deemed that the grantor was still the owner thereof until the happening of the contingency and did not transfer it until that time, nevertheless at that time he was still domiciled in New Jersey, and this state has the power and constitutional right to tax that transfer because, as hereinbefore shown, it has such right and power to tax the transfer of intangible property, by the owner thereof, if such owner be then domiciled in New Jersey. The fact that at the time of that transfer of the intangible interest of equitable remainder in the intangible securities, the legal title to the latter was in the New York trustee, does not prevent the taxability by New Jersey of the transfer, by the New Jersey citizen, of that intangible equitable remainder

interest still owned by him. *Curry* v. *McCanless, supra; Graves* v. *Elliott, supra.*

It is concluded therefore that the tax in question must be affirmed, both as to that portion based on the annuity refund transfers and as to the portion based on the transfers by trust deed.

[fol. 117] NEW JERSEY PREROGATIVE COURT

No. 5452

Between CENTRAL HANOVER BANK AND TRUST COMPANY, Executor &c., et al., Appellants,

and

J. H. THAYER MARTIN, State Tax Commissioner, Respondent

In the Matter of The Transfer Inheritance Taxes in the Estate of George W. E. Atkins, Deceased.

FINAL DECREE—Filed March 27, 1941

This matter coming on to be heard in the presence of Child, Riker, Marsh & Shipman, Theodore McC. Marsh, of counsel, proctors for appellants, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, and David T. Wilentz, Attorney General, and William A. Moore, [fol. 118] Assistant Attorney General, proctors for respondent, J. H. Thayer Martin, State Tax Commissioner, and the Court having examined the pleadings and transcript of record herein and having heard and considered the argument of proctors for appellants and respondent;

And It Appearing To The Court that George W. E. Atkins, the decedent, between July, 1932 and October, 1935, did purchase six refund annuity agreements or policies, five of the Equitable Life Assurance Society of New York and one of the New York Life Insurance Company, all essentially alike, whereunder each company, in consideration of a lump sum called the "single premium" or "capital investment" paid to the company by the decedent, bound itself to pay to the decedent certain fixed, equal, monthly installments during his life, and if he should die before receiving monthly

payments aggregating the amount of the "single premium" or "capital investment", to continue payment of the monthly installments after his death to his two sons, George Chew Atkins and John Norton Atkins, designated by decedent as his successor beneficiaries, until the total of said installments repaid equalled the amount paid in; that the right was reserved to the decedent under said agreements or policies to change said beneficiaries during his life; and that the State Tax Commissioner did assess a tax on the transfers to the two sons aforesaid of the installments coming due after the death of the decedent under these policies, as having been intended by decedent to take effect in possession or enjoyment at or after his death;

And The Court Having Concluded that the transfers to the two sons of the unpaid installments under the policies aforesaid were made by decedent in contemplation of his [fol. 119] death and intended by him to take effect in possession or enjoyment at or after his death; that said transfers are not saved from taxability because made through the medium of a third party; that the unpaid installments coming due at and after decedent's death and payable to his two sons are not proceeds of life insurance policies; that said refund annuity policies are not contracts of insurance insuring the life of decedent; that said refund annuity policies not being contracts of insurance and the unpaid installments thereunder not being proceeds of life insurance policies are not, therefore, affected by chapter 228, laws of 1909, as amended by chapter 144, laws of 1929, section 1, subsection "Fifth", paragraphs (b) and (c) (now R. S. 54:34-4b and c), in force when the policies were written and when the decedent died, nor by R. S. 54:34-4f and g passed in 1939; and that the assessment of inheritance tax by the State Tax Commissioner on these transfers should for these reasons be affirmed;

And It Further Appearing To The Court that the decedent, on May 16, 1929, did execute and deliver in the State of New York an irrevocable deed of trust of intangible personal property, the legal title to which and the beneficial ownership of which, was in the decedent, the grantor, then and for a considerable time prior thereto a domiciled resident of the State of New Jersey; that the securities or the paper evidence of ownership of said intangible personal property was, at that time and for sometime previously, and at all times subsequently, until the death of decedent,

physically located in the State of New York; that prior to the making of the deed of trust said securities or paper evidence of ownership had been in the custody of an agent of [fol. 120] said decedent in the State of New York; that the trustee under said deed of trust was a corporation of and having its office in the State of New York; that the trust deed provided by its express terms that it is to be construed according to the laws of the State of New York; that the decedent continued to be domiciled and resident in the State of New Jersey at all times subsequent to the execution and delivery of the trust deed until and at the time of his death; that the trust deed provided, in essence, for an equitable life estate to the grantor, for life, and thereafter to his wife, for life, if she survived him, and that the corpus in remainder be paid to the grantor's two sons, if living, with substitutionary gift over in case of their prior death; that the wife predeceased the grantor and the two sons survived him; that the State Tax Commissioner did levy and assess a tax on the transfers of the equitable interests in remainder under the deed of trust to the two sons on the premise that said transfers were intended to take effect in possession or enjoyment at or after the decedent's death and that the subject matter of the transfers, i. e., the intangible personal property comprising the corpus of the trust, was within the jurisdiction of the State of New Jersey at the time of the creation of the trust for the purpose of levying an inheritance tax on the transfer thereof;

And The Court Having Concluded that the tax herein complained of has been assessed on the transfer of certain interests in the property subject to the deed of trust and not on the property itself; that even if it were otherwise the result would not be different, since the property was intangible personal property and the power to tax such property inheres in the state of the domicile of the owner thereof; [fol. 121] that a transfer under the circumstances *sub judice* comes clearly within the scope of the express terms of subsection "First", section 1, chapter 228, laws of 1909, as amended to the date of the transferor's death; that the transfers of the contingent equitable interests in remainder in the trust estate to the two sons of the grantor were by deed made in contemplation of the grantor's death and also were intended to take effect in possession or enjoyment at or after his death; that the power of the state to impose a tax upon property, or upon the owner of property, rests

upon the dominion and control of that state over that property, or over the owner; that the fact that the act effectuating the transfer was performed in New York by the execution and delivery there of the trust deed and that the trust deed was made to a trustee which was a corporation of New York and located and doing business solely in the State of New York, and the transferees of the equitable interests were non-residents of the State of New Jersey, does not affect the validity of the tax; that the legal *situs* of the intangibles for purposes of taxation is the state of domicile of the owner; that the actual basis for taxation of intangibles is the control over the owner thereof by the state in which such owner is domiciled; that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner a tax on the use and enjoyment of rights in intangibles, measured by their value, including the right to tax the transfer of such intangibles, or any interest therein, whether such transfer is effected by an act in the state of domicile or an act in some other state, and even though such property may have acquired a busi- [fol. 122] ness *situs* in a state other than the state of domicile; that the transfers by the deed of trust to the sons of the grantor were contingent and said transfers did not become complete until the happening of the contingency; that the taxable event was the execution and delivery of the deed of trust; that since the grantor was then legally domiciled in the State of New Jersey and the subject matter of the transfers to the contingent beneficiaries was intangible personal property, the State of New Jersey then had the power and the constitutional right to impose an inheritance tax on such transfers, regardless of the fact that the estates in remainder were contingent and did not vest in the beneficiaries thereof until the death of the grantor; and that the assessment of inheritance tax on the transfers under the deed of trust aforesaid should for these reasons be affirmed;

It Is, on this twenty-seventh day of March, 1941 Ordered, Adjudged and Decreed that the assessment of transfer inheritance taxes on February 11, 1938 by the State Tax Commissioner, in the matter of the estate of George W. E. Atkins, deceased, late of Essex County, New Jersey, insofar as said assessment includes a tax on the transfers of the installments coming due at and after the death of the de-

cedent and payable to George Chew Atkins and John Norton Atkins, sons of the decedent, under the six refund annuity agreements or policies of the Equitable Life Assurance Society of New York and the New York Life Insurance Company, and insofar as said assessment includes a tax on the transfers to said two sons of the grantor of the equitable interests in remainder under the deed of trust executed by the decedent on May 16, 1929, be and the same is hereby af- [fol. 123] firmed, with costs to be paid by appellants to respondent.

Respectfully advised, Malcolm G. Buchanan, V.-O.
Luther A. Campbell, Ordinary.

The foregoing decree is approved as to form.

Child, Riker, Marsh and Shipman, Proctors for Appellants.

[File endorsement omitted.]

[fol. 124] New Jersey Supreme Court

Central Hanover Bank and Trust Company, etc., George Chew Atkins and John Norton Atkins, as Executors under the last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors,

vs.

J. H. Thayer Martin, State Tax Commissioner, Luther A. Campbell, Ordinary and Thomas A. Mathis, Register of the Prerogative Court, Respondents

Reasons for Reversal—Filed June 20, 1941

The Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors, hereby set forth the following as the reasons upon

which they will rely for the reversal of the decree of the Prerogative Court in the above entitled cause:

[fol. 125] 1. Because the decree of the Prerogative Court affirmed the assessment made by State Tax Commissioner of the State of New Jersey against the Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the last Will and Testament of George W. E. Atkins, and George Chew Atkins and John Norton Atkins, individually, whereas it should have reversed the same on the grounds set forth in the petition of appeal filed in said cause:

2. Because the decree of the Prerogative Court affirmed the assessment levied against the Estate of George W. E. Atkins, deceased, by the State Tax Commissioner of the State of New Jersey, wherein he fixed and determined the net value of said Estate to be the sum of $601,466.18, whereas the same is erroneous in that the said Tax Commissioner included as a part of the taxable assets thereof the sum of $28,683.30 being the amount payable to George Chew Atkins and John Norton Atkins under and in accordance with certain annuity policies of the Equitable Life Assurance Company of the United States and the New York Life Insurance Company, as follows:

Company	Beneficiary	Amount
Equitable Life—#9,142,731	George Chew Atkins and John Norton Atkins	$1,787 73
Equitable Life—#9,260,836	George Chew Atkins and John Norton Atkins	3 322 77
Equitable Life—#9,545,296	George Chew Atkins and John Norton Atkins	4 786 42
Equitable Life—#8,877,293	John Norton Atkins	3 808 87
Equitable Life—#8,948,433	George Chew Atkins	4 138 67
New York Life—#303,553	George Chew Atkins and John Norton Atkins	7 838 84

[fol. 126] When the moneys paid under and in accordance with the said policies were not the property of the decedent or of his said Estate and the transfer thereof was not a taxable transfer within the provisions of the Statute in such case made and provided, for the following reasons:

(a) The moneys are the proceeds of contracts of insurance and the payment of the same by the said companies to the beneficiaries therein named was not a transfer of

property by deed, grant, bargain, sale or gift made in contemplation of the death of George W. E. Atkins.

(b) The moneys are the proceeds of contracts of insurance and the payment of the same by the said companies to the beneficiaries therein named was not a transfer of property by deed, grant, bargain, sale or gift to take effect in possession or enjoyment at the death of George W. E. Atkins.

(c) The moneys were the proceeds of contracts of life insurance and as such exempt from taxation under the provision of the Statute in such case made and provided.

3. Because the decree of the Prerogative Court affirmed assessment levied against George Chew Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $298,991.86 as the amount of the property transferred to him and fixed the tax thereon at the sum of $9,809.59, whereas the same is erroneous in that the said Tax Commissioner included as a part thereof the sum of $10,367.88 representing the commuted value of [fol. 127] the annuity contracts of the Equitable Life Assurance Company on policies No. 9,142,731—9,260,836 and 9,545,296 and of the New York Life Insurance Company No. 303,553, and the sum of $4,138.67 representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,948,433 when the moneys paid under and in accordance with said contracts were not taxable and the transfer thereof was not a taxable transfer for the reasons more particularly set forth in paragraph two hereof.

4. Because the decree of the Prerogative Court affirmed the assessment levied against John Norton Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $302,474.32 as the amount of the property transferred to him and fixed the tax thereon at the sum of $10,098.46, whereas the same is erroneous in that the said Tax Commissioner included as a part thereof the sum of $10,367.88 representing the commuted value of the annuity contracts of the Equitable Life Assurance Company on policies No. 9,142,731—9,260,836 and 9,545,296 and of the New York Life Insurance Company No. 303,553, and the sum of $3,808.87 representing the com-

muted value of the annuity contract of the Equitable Life Assurance Company No. 8,877,293 when the moneys paid under and in accordance with said contracts were not taxable and the transfer thereof was not a taxable transfer for the reasons more particularly set forth in paragraph two hereof.

5. Because the decree of the Prerogative Court affirmed the assessment made by the State Tax Commissioner of the State of New Jersey, wherein he fixed and determined the [fol. 128] net value of the Estate of George W. E. Atkins to be the sum of $601,466.18 whereas the same is erroneous in that the State Tax Commissioner included as a part of the taxable property of said estate the sum of $376,917.04 being the appraised value of the securities comprising a certain trust fund created by and in accordance with an agreement of trust made on the 16th day of May, 1929, by and between George W. E. Atkins and the Central Hanover Bank and Trust Company of the City of New York whereas the bonds, stocks, mortgages and cash comprising said trust fund, were not taxable property and the transfer thereof was not a taxable transfer for the following reasons:

(a) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did not have a taxable situs within the State of New Jersey at the time of the execution of the trust agreement when the alleged taxable transfer occurred.

(b) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did not have a taxable situs within the State of New Jersey at the time of the death of George W. E. Atkins when the alleged taxable transfer occurred.

(c) The transfer alleged to be subject to the tax occurred without the territorial boundary of the State of New Jersey and was therefore not taxable by the State of New Jersey.

(d) The State of New Jersey had no jurisdiction to tax the transfer of said property as the owner thereof was not a resident of, nor domiciled within, nor the property located [fol. 129] within, the State of New Jersey at the time when the transfer alleged to be taxable occurred.

(e) The alleged taxable transfer occurred at the date of the death of George W. E. Atkins when the contingent re-

mainders to George Chew Atkins and John Norton Atkins first vested and the State of New Jersey had no jurisdiction to tax such transfer as at that time it had no power or control over either the owner of said property or the property itself as the owner was resident and domiciled, and all the property located, outside of the jurisdiction of the State of New Jersey.

(f) The property comprising the said trust fund was located without the territorial boundaries of the State of New Jersey at the time of the execution of the said agreement of trust on May 16th, 1939; the said agreement was executed by the parties thereto outside of the State of New Jersey, the legal title of said property transferred thereby to the Central Hanover Bank and Trust Company, a resident of the State of New York and domiciled therein, and that the legal title and possession of all of the said property has always remained in said Central Hanover Bank and Trust Company and the trust fund entirely administered by the Central Hanover Bank and Trust Company without the State of New Jersey since the execution of the said agreement and during the entire lifetime and at the death of the said George W. E. Atkins, and the transfer thereof is not a taxable transfer within the provisions of the statute of New Jersey in such case made and provided.

[fol. 130] (g) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries; and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(h) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person

within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(i) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fifth Amendment of the Consti- [fol. 131] tution of the United States prohibiting the taking of private property for public use without just compensation as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(j) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Sixteenth Section of the First Article of the Constitution of the State of New Jersey prohibiting the taxing of private property for public use without just compensation as the State of New Jersey had no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

6. Because the decree of the Prerogative Court affirmed the assessment levied against George Chew Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $298,991.86 as the amount of the property transferred to him and fixed the tax thereon at the sum of $9,899.59 whereas the same is erroneous in that the Tax Commissioner included as a part thereof the sum of $188,458.52 representing one-half of the value of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, when the bond, mortgages, stocks and cash, [fol. 132] comprising the said trust fund, were not taxable property and the transfer thereof to George Chew Atkins was not a taxable transfer for the reasons set forth in paragraph 5 hereof.

7. Because the decree of the Prerogative Court affirmed the assessment levied against John Norton Atkins by the State Tax Commissioner of the State of New Jersey, wherein he determined and fixed the sum of $302,474.32 as the amount of the property transferred to him and fixed the tax thereon at the sum of $10,098.46, whereas the same is erroneous in that the Tax Commissioner included as a part thereof the sum of $188,458.52 representing one-half of the value of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, when the bond, mortgages, stocks and cash, comprising the said trust fund, were not taxable property and the transfer thereof to John Norton Atkins was not a taxable transfer for the reasons set forth in paragraph 5 hereof.

Child, Riker, Marsh & Shipman, Attorneys of Prosecutors. Theo. McC. Marsh, Of Counsel.

[fol. 133] New Jersey Supreme Court

Opinion—Filed January 5, 1942

For prosecutors, Child, Riker, Marsh & Shipman, Theo. McC. Marsh.

For respondents, David T. Wilentz, William A. Moore.

[fol. 134] Before Justices Bodine, Perskie and Porter.

Per Curiam:

The facts in this case have been carefully examined, as well as the argument of counsel. The opinion of the learned Vice Chancellor reported in 129 N. J. E. 186, is a complete refutation of every argument made.

The tax, as assessed, will be affirmed.

[fol. 135] NEW JERSEY SUPREME COURT

CENTRAL HANOVER BANK AND TRUST COMPANY, etc., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent

In the Matter of The Transfer Inheritance Tax Assessment in the Estate of George W. E. Atkins, Deceased

RULE FOR JUDGMENT—Entered January 14, 1942

This cause coming on to be heard at the October Term, 1941, of this Court; and the Court having inspected the return to the writ of *certiorari* issued therein, and having considered the reasons assigned for the reversal of the decree of the Prerogative Court entered in this matter, affirming the transfer inheritance taxes assessed in the matter of the estate of George W. E. Atkins, deceased, and the Court being of the opinion that said decree should be affirmed and [fol. 136] the writ dismissed;

It is on this 14th day of January, 1942, Ordered that the decree of the Prerogative Court, entered March 27, 1941, affirming the assessment of transfer inheritance taxes in the matter of the estate of George W. E. Atkins, deceased, be and the same is hereby affirmed and the writ of *certiorari* allowed herein dismissed.

J. Lr. Bodine, J. S. C.

Entered: January 14, 1942.

Actually entered January 15, 1942.

On Motion of: David T. Wilentz, Attorney General of New Jersey, Attorney for Defendant.

[fol. 137] NEW JERSEY SUPREME COURT

[Title omitted]

ORDER ALLOWING COSTS—Entered Jan. 14, 1942

An opinion of this Court, decided January 5, 1942, in the above cause, affirming a certain decree of the Prerogative Court, filed March 27, 1941, in favor of defendant-respondent, having failed to provide for the payment of costs in this Court to the defendant-respondent, and application now being made for the payment of such costs to defendant-respondent;

[fol. 138] It is, on this 14th day of January, one thousand nine hundred and forty-two, ordered that costs be allowed to the defendant-respondent, and the Clerk of this Court is hereby directed to tax such costs for and on behalf of defendant-respondent.

J. L. Bodine, J. S. C.

Entered: January 14th, 1942.

Actually entered January 15, 1942.

On Motion of: David T. Wilentz, Attorney General of New Jersey, Attorney for Defendant-Respondent.

[fol. 139] NEW JERSEY SUPREME COURT

[Title omitted]

NOTICE OF APPEAL—February 11, 1942

To David T. Wilentz, Esquire, Attorney of the Defendant-Respondent:

Take notice that, Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, prosecutors-appellants, appeal from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court on the 14th day of January, 1942, affirming the decree of the Prerogative Court entered March 27th, 1941 affirming the assessment of transfer inheritance taxes in the matter of the Estate of George W. E. [fol. 140] Atkins, deceased, and also from the order of the Supreme Court dated January 14th, 1942 allowing costs on

the appeal to the respondent, to the New Jersey Court of Errors and Appeals.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutors-Appellants.

Theodore McC. Marsh, Of Counsel.

Dated: February 11th, 1942.

Service of the within notice is hereby acknowledged this — day of February, 1942.

David T. Wilentz, Attorney General, Attorney of Defendant-Respondent.

[fol. 141] New Jersey Court of Errors and Appeals

[Title omitted]

Grounds of Appeal—February 26, 1942

To David T. Wilentz, Attorney General, Attorney of Defendant-Respondent:

The prosecutors-appellants, Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, assign the following as their grounds of appeal in the above entitled cause:

1. That the Supreme Court erred in affirming the decree of the Prerogative Court dated March 27th, 1941 for the reasons assigned in the Supreme Court.

[fol. 142] 2. The rule of the Supreme Court, dated the 14th day of January, 1942, which imposed upon the prosecutors-appellants the taxed costs of the appeal to the Supreme Court is erroneous in that the judgment of the Prerogative Court should have been reversed and the taxed costs imposed upon the defendant.

Child, Riker, Marsh & Shipman, Attorneys of Prosecutors-Appellants.

Theodore McC. Marsh, Of Counsel.

Dated: February 26th, 1942.

Service of the within Grounds of Appeal is hereby acknowledged this 27 day of February, 1942.

David T. Wilentz, Attorney General, Attorney of Defendant-Respondent.

[fol. 143] NEW JERSEY COURT OF ERRORS AND APPEALS

No. 19, May Term, 1942

CENTRAL HANOVER BANK AND TRUST COMPANY, ETC., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors Under the Last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutor-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent

OPINION—Sept. 18, 1942

Argued May 20, 1942; decided September 18, 1942.

On appeal from a judgment of the Supreme Court.

For the appellants: Riker, Marsh & Shipman; Theo. McC. Marsh, of counsel.

For the respondent: David T. Wilentz, Attorney General, and William A. Moore, Assistant Attorney General.

The opinion of the court was delivered by HEHER, J.:

We concur in the view of the Supreme Court that the decree of the Prerogative Court should be affirmed, generally for the reasons expressed in the opinion delivered by the late Vice Ordinary Buchanan.

We deem it prudent to observe that the test of a gift in contemplation of death in the statutory sense is whether the determinative motive is "of the sort which leads to testamentary disposition." It is requisite that the "thought of death" be the impelling cause of the transfer. If that be a controlling motive inducing the disposition of the property, the transfer is taxable under the statute. The legislative design was to place testamentary gifts and substitutes therefor in the same succession tax category, and thus to secure equality of taxation and prevent evasion of taxes. The inquiry therefore is whether the gift was essentially testamentary in character. Was it made as a substi-[fol. 144] tute for a testamentary disposition? Was the generating thought of death as distinguished from purposes associated with life? If so, contemplation of death in the

statutory sense was the motivation for the transfer of the property. *Perry v. Martin*, 125 N. J. L. 46.

The evidence reveals that the refund annuity transfers are testamentary in nature, and therefore taxable. And we are in accord with the Vice Ordinary's view that they also fall into the category of gifts intended to take effect in possession and enjoyment at or after the donor's death, and are taxable on that ground.

Judgment affirmed.

Endorsed: "Filed Sep. 18, 1942, J. A Brophy, Clerk."

[fol. 145] NEW JERSEY COURT OF ERRORS AND APPEALS

No. 19, May Term 1942

CENTRAL HANOVER BANK AND TRUST COMPANY, ETC., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors Under the Last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent.

In the Matter of the Transfer Inheritance Tax Assessment in the Estate of George W. E. Atkins, Deceased.

ORDER ON AFFIRMANCE OF JUDGMENT—Sept. 18, 1942—Filed Oct. 24 1942

This cause having been duly argued at the May Term, 1942 of this court by Riker, Marsh and Shipman, of counsel for the appellant and David T. Wilentz, Attorney General of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court,

It is thereupon, on this 18th day of September, 1942, ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court

to be proceeded with in accordance with this judgment and the practice of said court.

On motion of David T. Wilentz, Attorney-General, Attorney for Defendant-Respondent.
By William A. Moore, Special Counsel.

[fol. 146] NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

ORDER FOR SUBSTITUTION—Dec. 4, 1942

It appearing that the term of office of J. H. Thayer Martin as State Tax Commissioner of the State of New Jersey has expired and that William D. Kelly has been duly appointed his successor and is now acting as State Tax Commissioner of New Jersey and counsel for the respondent consenting,

It is hereby Ordered that William D. Kelly, State Tax Commissioner, be substituted for J. H. Thayer Martin as State Tax Commissioner as party respondent in the above entitled cause.

Riker, Marsh & Shipman, Attorneys of Petitioners-Appellants.

Dated: December 4th, 1942.

Notice of application for and entry of the above order is hereby waived.

David T. Wilentz, Attorney General of New Jersey, Attorney of Respondent.

[fol. 147] SUPREME COURT OF THE UNITED STATES

CENTRAL HANOVER BANK AND TRUST COMPANY, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors Under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, Individually, Petitioners-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner (William D. Kelly, Successor), Respondent

PETITION FOR APPEAL—Filed Dec. 17, 1942

To the Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States:

Your petitioners, Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, respectfully show;

1. On December 2, 1942, there was duly presented to the Honorable Luther A. Campbell, Chancellor of the State of New Jersey and Presiding Judge of the Court of Errors and Appeals of the State of New Jersey, a petition for appeal in the above entitled cause, together with assignment of errors, prayer for reversal, statement of jurisdiction and order for appeal.

2. On December 2, 1942, Honorable Luther A. Campbell, Chancellor and Presiding Judge as aforesaid, denied your petitioners said petition for allowance of appeal, solely on the ground of lack of jurisdiction. His said denial of said appeal is endorsed upon the back of said petition of appeal which is presented herewith.

[fol. 148] 3. That George W. E. Atkins died on the 9th day of November, 1936, a resident of the State of New Jersey, leaving a last will and testament, which was duly admitted to probate by the Surrogate of Essex County, State of New Jersey. In and by said last will and testament he appointed your petitioners as the executors and they have duly qualified and taken upon themselves the burden of the

administration of said estate, and are now acting as such executors.

4. On May 16, 1929, in the City and State of New York, said George W. E. Atkins irrevocably assigned, transferred and delivered to the Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York and doing business in the City and State of New York, certain stock, securities and other property then in the possession of said banking corporation, to be held by the said banking corporation in trust for the purposes set forth in a certain agreement dated and executed on the same day by and between said George W. E. Atkins and said Central Hanover Bank and Trust Company. Said agreement provided that the said trustee should pay the net income to said George W. E. Atkins, grantor, during his life, and thereafter to his wife, Mary M. C. Atkins, for her life in case she survived the grantor, and further provided that in case the grantor's wife should not survive the grantor and in case his son, George Chew Atkins, should survive the grantor, that then upon the death of the grantor said trustee should divide the trust estate and transfer, assign and pay over to said George Chew Atkins one-half of the principal of the trust estate, and similarly provided that in case the grantor's said wife should not survive the grantor and his son, John Norton Atkins, should survive the grantor, that then upon the death of the grantor the said trustee should transfer, assign and pay over to the said [fol. 149] John Norton Atkins the remaining one-half of the principal of the trust fund. Further provisions were contained in said agreement for the disposition of the trust estate in the event that either or both of the said sons should not survive the grantor. Mary M. C. Atkins predeceased the grantor and both of the sons survived. At all times after the transfer and delivery of said property to the trustee and the execution of said agreement, the securities constituting the trust fund were located and the trust was administered in the City of New York and State of New York, and the domicile of the Central Hanover Bank and Trust Company, the owner of the securities, was in said City of New York, and the said George Chew Atkins and John Norton Atkins, sons of the grantor, were non-residents of New Jersey.

5. Respondent, J. H. Thayer Martin, as State Tax Commissioner of the State of New Jersey, purporting to act in

pursuance of the provisions of Chapter 228 Laws of 1909, as amended by Chapter 303 Laws of 1931 and Chapter 90 Laws of 1935, assessed and fixed the net cash value of the estate of George W. E. Atkins at the sum of $601,466.18, and levied the taxes upon the transfers to the individual appellants, George Chew Atkins and John Norton Atkins, as follows:

George Chew Atkins	$ 9,899.59
John Norton Atkins	10,098.46.

6. In assessing and fixing the said value of the estate and in levying such taxes the State Tax Commissioner included in the net cash value of the estate the sum of $376,917.04, being the appraised value of the securities constituting the corpus of the said trust fund held by said Central Hanover Bank and Trust Company under said agreement of May 16, 1929, and the said State Tax Commissioner included in the taxes levied against the individual appellants a tax on the transfer of one-half of the said trust fund to each of said [fol. 150] appellants, such taxes on the transfers of the trust fund being as follows:

George Chew Atkins	$8,133.59
John Norton Atkins	8,227.99.

7. Pursuant to the provisions of Chapter 228 P. L. 1909, and the several supplements and amendments thereto as now set forth in Revised Statutes of New Jersey of 1937, Title 54, Chapter 34, petitioners appealed from the said assessments and the levying of said taxes to the Prerogative Court of the State of New Jersey, which said court affirmed the same. Petitioners contended in said appeal that the State of New Jersey had no legal right or jurisdiction to assess the said property constituting the trust fund or to levy a tax upon its transfer because the said property did not have a taxable situs within the State of New Jersey, and because said property was located without the territorial boundaries of said state at the time of its transfer to said Central Hanover Bank and Trust Company, and thereafter so remained, and the legal title thereto and possession thereof were at all times thereafter held without the State of New Jersey by said corporation, a resident of and domiciled within the State of New York, and that if it should be determined that the said statutes respecting the assessment of estates and taxation of transfers, hereinbefore referred to, provided for, required or permitted the taxa-

tion of the transfers aforesaid, the effect would be to render Section 4 of Chapter 228 of the Pamphlet Laws of New Jersey 1909, as amended by Section 1 of Chapter 90 of the Pamphlet Laws of New Jersey 1935, and Section 18 of said Chapter 228 as amended by Chapter 303 of said Laws of New Jersey 1931, unconstitutional and void as a violation of the Fourteenth Amendment of the United States Constitution, in that it would deprive petitioners of their property without due process of law and would also deprive them of the equal protection of the laws. The Prerogative Court overruled petitioners' contention, and entered a decree affirming the action of the State Tax Commissioner in fixing the value of the estate and levying the taxes aforesaid, and dismissing the appeal.

[fol. 151] 8. Petitioners thereupon prosecuted a writ of certiorari in the New Jersey Supreme Court to review the said decree of the Prerogative Court, and in such proceedings the same constitutional question was raised before said New Jersey Supreme Court, to wit, that the situs of the property constituting the trust fund assessed was, and the transfer thereof occurred, outside of the State of New Jersey, and therefore the State of New Jersey has no jurisdiction to assess the property and to tax the transfer thereof. The New Jersey Supreme Court affirmed the decree of the Prerogative Court for the reasons expressed in the opinion of such Prerogative Court.

9. Petitioners thereupon appealed from the judgment of the New Jersey Supreme Court to the Court of Errors and Appeals, and the same constitutional question as above stated was raised, and said Court affirmed the judgment of the New Jersey Supreme Court with respect to such question upon the opinion of the Prerogative Court and for the reasons expressed therein. The said Court of Errors and Appeals is the highest court of the State of New Jersey, and the said judgment of said court is a final judgment.

10. In this cause there is drawn in question the validity of the statutes of New Jersey, Chapter 228 of the Laws of 1909, Section 1, as amended by Chapter 90 of the Laws of 1935, and Section 18, as amended by Chapter 303 of the Laws of 1931, on the ground that said statutes, as construed applied and administered by the courts of New Jersey, having authorized the assessment of said trust fund, being

property outside of the State of New Jersey, and the levy of a tax upon the transfer thereof outside of said state, are repugnant to the Fourteenth Amendment of the Constitution of the United States; and the final decision and judgment of the highest court of said State is in favor of the validity of said statutes.

[fol. 152] 11. The Court of Errors and Appeals by its decision and judgment did uphold the right of the State of New Jersey and of J. H. Thayer Martin, as State Tax Commissioner, acting under the statutes above mentioned, to assess the property of the petitioners outside of the State of New Jersey and to levy a tax upon the transfer thereof beyond the jurisdiction of the State of New Jersey and in the City of New York and State of New York where the said property was located, and such statutes as thus applied and administered are repugnant to the Fourteenth Amendment of the United States Constitution, by depriving petitioners of their property without due process of law and by denying them the equal protection of the laws.

Wherefore, petitioners pray for the allowance of an appeal from the judgment and decision of the said Court of Errors and Appeals of the State of New Jersey to the Supreme Court of the United States, in order that the decision and judgment of the Court of Errors and Appeals of the State of New Jersey may be examined and reversed. Petitioners further pray that a citation be issued directed to the State Tax Commissioner of New Jersey, the appellee herein, and that a transcript of the record, proceedings and papers in the case, duly authenticated by the Clerk of the Court of Errors and Appeals of the State of New Jersey, be sent to the Supreme Court of the United States, as provided by law. The errors upon which the petitioners claim to be entitled to appeal are those above stated and more fully set forth in an assignment of errors filed herewith.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Petitioners-Appellants.

[fol. 153] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 17, 1942

Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, assign the following errors in the records and proceedings in this cause.

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner, in assessing and fixing the cash value of the property passing to George Chew [fol. 154] Atkins at the sum of $298,991.86, and in levying a tax on the transfer thereof in the sum of $9,899.59, included as a part of the property transferred to said George Chew Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey and beyond the jurisdiction of the said State. The said Court of Errors and Appeals erred in ruling that the said sections of the statutes of New Jersey, as construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not

deprive petitioners-appellants of their property without due process of law.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to George Chew [fol. 155] Atkins at the sum of $298,991.86 and in levying a tax on the transfer thereof in the sum of $9,899.59, included as a part of the property transferred to said George Chew Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey, and beyond the jurisdiction of said State; and the said Court of Errors and Appeals erred in ruling that such sections of said statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deny the petitioners-appellants the equal protection of the laws.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under

Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937; 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to John Norton Atkins at the sum of $302,474.32 and in levying a tax on [fol. 156] the transfer thereof in the sum of $10,098.46, included as a part of the property transferred to said John Norton Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York and outside of the State of New Jersey, and beyond the jurisdiction of the said State; and the said Court of Errors and Appeals erred in ruling that the said sections of the statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deprive petitioners-appellants of their property without due process of law.

4. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to John Norton Atkins at the sum of $302,474.32 and in levying a tax on the transfer thereof in the sum of $10,098.46, included as a part of the property transferred to said John Norton Atkins and [fol. 157] used as a basis of such tax one-half of the appraised value of a certain trust fund created by George

W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey and beyond the jurisdiction of said State; and the said Court of Errors and Appeals erred in ruling that the said sections of the said statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deny the petitioners-appellants the equal protection of the laws.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Appellants

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[fol. 158] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—December 15, 1942

It appearing to the Court in the cause stated that the petitioners-appellants, Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins, and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, have filed their petition for appeal to the Supreme Court of the United States, from the judgment of the Court of Errors and Appeals of New Jersey and have filed therewith their assignment of errors, and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question,

It is hereby Ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the judgment rendered in said cause by the Court of Errors and Appeals of New Jersey on the 18th day of September, 1942, and

that said petitioners-appellants give a bond with good and sufficient security in the sum of Two Hundred and Fifty [fol. 159] Dollars ($250) that they as appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good.

It is further Ordered that the Clerk of the Court of Errors and Appeals of the State of New Jersey prepare and certify a transcript of the record and proceedings and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

Dated: December 15th, 1942.

Owen J. Roberts, Associate Justice, Supreme Court of the United States.

Jehiel G. Shipman, Claude A. Hope, Counsel for Petitioners-Appellants.

[fol. 160] Citation in usual form omitted in printing.

[fols. 161-164] Cost Bond on Appeal for $250.00 approved and filed Dec. 19, 1942 omitted in printing.

[fol. 165] In the Court of Errors and Appeals

Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. B. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, Appellants,

vs.

William D. Kelly, State Tax Commissioner (Successor to J. H. Thayer Martin), Appellee

Praecipe for Record—Filed December 17, 1942

The following are the portions of the record which are to be incorporated in the transcript to be made by the Clerk and filed with the Clerk of the United States Supreme Court:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.

4. Citation and bond.

5. One copy of the printed state of the Case in the above entitled cases in the New Jersey Court of Errors and Appeals.

6. Statement of basis of jurisdiction under Rule 12.

7. Proof or acknowledgement of service upon the appellee of the citation and of copy of the petition, order allowing appeal, assignments of error and statement required by paragraph 1 of Rule 12, and a statement directing attention to paragraph 3 of Rule 12 and proof of service of these papers.

[fol. 166] 8. Per curiam opinion of the Court of Errors and Appeals and judgments entered thereon in the above cases.

9. Order of Substitution.

10. This praecipe and proof or acknowledgment of service of a copy thereof.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Appellants.

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 168] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed January 29, 1943

To the Clerk of the Supreme Court of the United States:

Come now the appellants, pursuant to paragraph 9 of Rule 13 of the Revised Rules of this Court, and adopt their Assignment of Errors as their statement of points to be relied upon, and designate the following parts of the record as necessary for the consideration thereof, viz.:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.
4. Citation.
5. Praecipe for transcript of record.

6. Printed State of Case in the New Jersey Court of Errors and Appeals, with the exception of pages 42-82 inclusive.

7. Opinion of the Court of Errors and Appeals.

8. Judgment of the Court of Errors and Appeals.

9. This statement of points and designation as to printing.

Dated, January 27th, 1943.

Robert McC. Marsh, Jehiel G. Shipman, Claude A. Hope, Counsel for Appellants.

[fol. 169] Supreme Court of the United States, October Term, 1942

No. 659

Order Noting Probable Jurisdiction—February 15, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 15, 1943.

Endorsed on Cover: File No. 47,160. New Jersey, Court of Errors and Appeals, Term No. 659. Central Hanover Bank and Trust Company, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors, etc., et al., Appellants vs. William D. Kelly, State Tax Commissioner of New Jersey. Filed January 18, 1943. Term No. 659, O. T. 1942.

FILE COPY

Supreme Court, U. S.
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JAN 18 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS, ETC., ET AL.,

Appellants,

vs.

WILLIAM D. KELLY, STATE TAX COMMISSIONER OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

JEHIEL G. SHIPMAN,
CLAUDE A. HOPE,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF GEORGE W. E. ATKINS, DECEASED, AND GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, INDIVIDUALLY,

Appellants,

vs.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER (WILLIAM D. KELLY, SUCCESSOR),

Appellee.

STATEMENT AS TO JURISDICTION.

Basis of Jurisdiction of the Supreme Court of the United States.

The basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question is that said appeal is from a final judgment of the Court of Errors and Appeals of New Jersey, which is the highest court of said State in

which a decision in this suit can be had. There is drawn in question in this suit the validity of a statute of the State of New Jersey on the ground of its being repugnant to the Constitution of the United States, and the said final judgment is a decision in favor of the validity of the said statute.

I.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction is found in Title 28, Section 344, subdivision (a) of the United States Code (also Judicial Code, Section 237), as amended by Chapter 14 of the Act of January 31, 1928, and Chapter 440 of the Act of April 26, 1928, and reading as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court; and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

II.

The Statute of the State the Validity of Which Is Involved.

The statute of New Jersey, the validity of which is involved, is found in Sections 1 and 18 of Chapter 228 of the Laws of 1909 as respectively amended by Section 1 of

Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931.

Said Section 1 as so amended reads as follows:

"1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred ($500.00) dollars, or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases;

First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of real property within this State or of goods, wares and merchandise within this State, and the decedent was non-resident of the State at the time of his death.

Third. When the transfer is of property made by a resident, or is of real property within this State, or of goods, wares and merchandise within this State, made by a non-resident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof and without an adequate valuable consideration, shall in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

Fourth. When any person or corporation comes into the possession or enjoyment, by a transfer from a resident or from a nonresident decedent, when such nonresident decedent's property consists of real property within this State or of goods, wares and merchandise

within this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by an instrument taking effect after the passage of this act, or of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of this act." (P. L. 1935, pp. 264-5.)

(N. B. The remainder of the section is believed immaterial to the present issue.)

Said Section 18 as so amended reads as follows:

"18. In order to fix the value of property of persons whose estates shall be liable to the payment of a tax under this act, whether the same be in the ownership of a resident or nonresident decedent, the State Tax Commissioner on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and whenever occasion may require. Every such appraiser shall forthwith give notice, by mail, to such persons as the State Tax Commissioner shall direct, of the time and place when and where he will appraise such property. He shall at such time and place appraise the same at its fair market value, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make report thereof, and of such value, in writing to said State Tax Commissioner, together with such other facts in relation thereto as the said State Tax Commissioner may, by order, require, which report and other data required by said Commissioner shall be filed in the office of such Commissioner, and from said report the said State Tax Commissioner shall forthwith assess and fix the cash value of such estate and levy the tax to which the same is liable, and shall immediately give notice thereof, by mail, to all parties known

by said State Tax Commissioner to be interested therein. Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interests and costs, if the said tax be affirmed by the Ordinary. Any person failing to attend before an appraiser after service of a subpoena, or refusing to give evidence concerning any estate, shall be liable to a penalty of two hundred dollars, to be recovered in an action of debt by the State Tax Commissioner." (P. L. 1931, pp. 763-4.)

The foregoing sections were in effect at the time the tax involved in the pending cause was levied. They are now incorporated in the Revised Statues of New Jersey, 1937, as 54:34-1 and 54:34-12.

In the decision and judgment appealed from, the New Jersey Court of Errors and Appeals has construed, applied and administered these sections as authorizing the assessment and the levy of a tax upon the transfer to nonresidents of New Jersey of certain interests in a trust fund owned and held in the City and State of New York by Central Hanover Bank and Trust Company, a New York corporation, under an irrevocable trust agreement made in the said City and State of New York by the decedent, George W. E. Atkins, a resident of New Jersey, in his lifetime. The appellants contended in said Court of Errors and Appeals, and also in the lower courts of the State, that if the said statutes provide for the taxation of such transfer, then they are unconstitutional and void as a violation of the Fourteenth Amendment to the Constitution of the United States. This contention was overruled by said Court of Errors and Appeals and lower courts of New Jersey.

III.

Date of Judgment and of Application for Appeal.

The judgment sought to be reviewed was entered September 18th, 1942, and this application for appeal is presented on December 15th, 1942.

IV.

Nature of the Case, Raising of the Federal Question, and Rulings of the Court.

(a) *Nature of the Case.*

The proceeding in the New Jersey courts was one to review the action of the State Tax Commissioner in assessing and levying a succession or transfer tax under said statutes upon the estate of George W. E. Atkins, a resident of New Jersey. The Commissioner included in the property assessed a certain trust fund held by Central Hanover Bank and Trust Company, a New York corporation, under an irrevocable trust agreement made by said decedent in his lifetime with said corporation in the City and State of New York, and the Commissioner levied a tax upon the estate of the decedent measured in part by interests created by the trust agreement which, having been theretofore contingent, became vested upon the death of the decedent in nonresident beneficiaries. In the New Jersey courts the appellants also challenged the taxation of certain refund annuity insurance policies, but the decision on that point presents no federal question. The present appeal relates only to the decision with respect to the trust fund.

The decedent died November 9, 1936. The trust agreement was executed May 16, 1929. The securities constituting the trust fund, which had a par value in excess of $389,000, had theretofore been in the custody of the said Central

Hanover Bank and Trust Company in New York City in conformity with a "safe keeping" agreement made between the parties on May 15, 1924.

From the time of the execution of the trust agreement until the grantor's death, all of the securities belonging to the trust fund were kept and the trust administered by the Central Hanover Bank solely at its principal office in New York City.

The agreement creating the trust was executed by the parties in New York City and contains the following paragraph:

> "This indenture shall be construed according to the laws of the State of New York where it is made and where it is to be enforced."

The trust is irrevocable and the grantor retained no power whatever over the funds involved or their disposition. The agreement provided that the trustee should pay the net income to George W. E. Atkins, grantor, during his life, and thereafter, to his wife, Mary M. C. Atkins, for her life in case she survived the grantor. It further provided that in case the grantor's wife should not survive the grantor, and in case his son, George Chew Atkins, should survive, that then the trustee should transfer and assign to said son one-half of the principal of the trust fund. It similarly provided that in case the grantor's wife should not survive the grantor, and in case his son, John Norton Atkins, should survive, the trustee should assign and transfer to said son the remaining one-half of the principal. Further provisions, immaterial here, were contained in the agreement for the disposition of the trust estate in the event that either or both of the said sons should not survive the grantor.

Mary M. C. Atkins predeceased the grantor and both of the sons survived him. They are both nonresidents of New

Jersey, one residing at Bronte, Ontario, and the other at Sewanee, Tennessee. (Since the decedent's death, the latter has moved to Richmond, Virginia.)

The grantor's last will and testament was duly admitted to probate by the Surrogate of Essex County, New Jersey. The appellants are the executors of such will and the individual beneficiaries of the remainder interests in the trust which vested on his death.

The Tax Commissioner of New Jersey fixed and determined the value of the net estate of George W. E. Atkins under the statute, and included therein the principal of the trust fund. He then imposed a tax on the transfer to George Chew Atkins of the property passing under the will of George W. E. Atkins and also of the property passing under the trust agreement, such tax amounting in all to $9,899.59, and similarly imposed a tax upon the transfers to John Norton Atkins, such tax amounting to $10,098.46.

Petitioners have contended that the property transferred under the agreement of trust was not subject to taxation by the State of New Jersey on the ground that the situs of the property comprising the trust fund was located in the State of New York, and that the transfer thereof occurred in such State and not in New Jersey. They further contended that if the tax was held valid that then the statutes under which the assessment and levy was made are repugnant to the Fourteenth Amendment, by assuming to give the State of New Jersey and its Commissioner the right to levy and assess personal property and the transfer thereof beyond its jurisdiction, and thus depriving petitioners of their property without due process of law and denying to them the equal protection of the laws.

(b) *Raising of Federal question and rulings of the Court.*

The constitutional question was first raised on the appeal to the Prerogative Court from the action of the State Tax

Commissioner in levying the tax. It was expressly set forth in the petition of appeal to that Court, as will be shown by examination of the printed record (pages 9-11 incl.) made a part of the transcript. Sub-paragraphs (a), (b), (d) and (e) of Section 2 of said petition read as follows:

"a. The State of New Jersey had no jurisdiction to tax the property as it did not have a taxable situs within the State of New Jersey at the time of the transfer thereof.

b. The transfer alleged to be subject to the tax occurred without the territorial boundaries of the State of New Jersey and is, therefore, not taxable by the State of New Jersey.

d. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

e. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void."

The Prerogative Court definitely overruled the contention that the assessment of the tax, if held valid, would render the Statutes above mentioned repugnant to the Fourteenth Amendment to the Constitution. The matter was discussed at length in the opinion, or Conclusions, of that Court by Vice Ordinary Buchanan, whose opinion is annexed to this statement. The following extracts from the opinion are especially pertinent to show the ruling of the Court:

> "We come now to the contentions more strongly stressed by appellants—i.e. (a) that at the time the deed was made the property thereby transferred to the trustee was located outside the territorial boundaries of New Jersey, and so continued at all times thereafter, and hence New Jersey had no power to tax the transfers made by that deed; (b) that the interests given in the sons were contingent and did not vest until the grantor's death, and hence that no transfer to the sons (being the transfer on which the present tax was levied and assessed) took place until the death of the grantor; (c) that at the time of grantor's death he was not the owner of the property transferred by the trust deed and hence that property was not located in New Jersey and therefore New Jersey had no power to tax that transfer thereof." (Pages 103-104)

> "The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title in the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, and also a transfer, at the same time, of an equitable interest of contingent remainder therein, to the two sons. Under the authorities cited, New Jersey had the power and constitutional right to tax either or both of these transfers." (Page 108)

Moreover, the final decree of the Prerogative Court, entered upon the foregoing opinion, repeated and summed up

the conclusions of the Vice Ordinary on this point in the following language:

> "And the Court having concluded that * * * the State of New Jersey then had the power and the constitutional right to impose an inheritance tax upon such transfers * * *" (Printed record, pages 120-122)

A writ of certiorari was issued from the Supreme Court of New Jersey to review the decree of the Prerogative Court. The same constitutional question was raised in the reasons for reversal, filed in said Court, Section 5 of said reasons assigned by the appellants for reversal reading as follows:

> "5.-Because the decree of the Prerogative Court affirmed the assessment made by the State Tax Commissioner of the State of New Jersey, wherein he fixed and determined the net value of the Estate of George W. E. Atkins to be the sum of $601,466.18 whereas the same is erroneous in that the State Tax Commissioner included as a part of the taxable property of said estate the sum of $376,917.04 being the appraised value of the securities comprising a certain trust fund created by and in accordance with an agreement of trust made on the 16th day of May, 1929, by and between George W. E. Atkins and the Central Hanover Bank and Trust Company of the City of New York whereas the bonds, stocks, mortgages and cash, comprising said trust fund, were not taxable property and the transfer thereof was not a taxable transfer for the following reasons:
>
> (a) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did not have a taxable situs within the State of New Jersey at the time of the execution of the trust agreement when the alleged taxable transfer occurred.
>
> (b) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did

not have a taxable situs within the State of New Jersey at the time of the death of George W. E. Atkins when the alleged taxable transfer occurred.

(c) The transfer alleged to be subject to the tax occurred without the territorial boundary of the State of New Jersey and was therefore not taxable by the State of New Jersey.

(d) The State of New Jersey had no jurisdiction to tax the transfer of said property as the owner thereof was not a resident of, nor domiciled within, nor the property located within, the State of New Jersey at the time when the transfer alleged to be taxable occurred.

(e) The alleged taxable transfer occurred at the date of the death of George W. E. Atkins when the contingent remainders to George Chew Atkins and John Norton Atkins first vested and the State of New Jersey had no jurisdiction to tax such transfer as at that time it had no power or control over either the owner of said property or the property itself as the owner was resident and domiciled, and all the property located, outside of the jurisdiction of the State of New Jersey.

(f) The property comprising the said trust fund was located without the territorial boundaries of the State of New Jersey at the time of the execution of the said agreement of trust on May 16th, 1939; the said agreement was executed by the parties thereto outside of the State of New Jersey, the legal title of said property transferred thereby to the Central Hanover Bank and Trust Company, a resident of the State of New York and domiciled therein, and that the legal title and possession of all of the said property has always remained in said Central Hanover Bank and Trust Company and the trust fund entirely administered by the Central Hanover Bank and Trust Company without the State of New Jersey since the execution of the said agreement and during the entire lifetime and at the death of the said George W. E. Atkins, and the transfer thereof is not a taxable transfer within the provisions

of the statute of New Jersey in such case made and provided.

(g) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(h) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void." (pages 127-130)

The Supreme Court of New Jersey affirmed the decree of the Prerogative Court on the basis of the opinion of the Vice Ordinary. A copy of the opinion of the Supreme Court is annexed hereto.

The judgment of the Supreme Court was appealed to the Court of Errors and Appeals. The grounds of appeal allege that the judgment of the Supreme Court was erroneous for the reasons filed in such Court and above referred to. (Printed Record, page 141.) The Court of Errors and Appeals affirmed, with respect to this contention, on the

basis of the opinion of the Prerogative Court. A copy of the opinion is attached hereto. This judgment of the Court of Errors accordingly held that the State had power to levy the tax in question and that the sections of the statute as so construed and applied are not repugnant to the Fourteenth Amendment of the Constitution.

Since the entry of the judgment of the Court of Errors and Appeals an order has been entered on stipulation substituting William D. Kelly as State Tax Commissioner and respondent, in place of J. H. Thayer Martin.

V.

Cases Sustaining the Jurisdiction.

The decisions of the Supreme Court of the United States which are believed to sustain the jurisdiction to entertain this appeal and reverse the judgment appealed from are: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Fiske* v. *Kansas*, 274 U. S. 380; *Provident Savings Assn.* v. *Kentucky*, 239 U. S. 103; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Binney* v. *Long*, 299 U. S. 280; *Coolidge* v. *Long*, 282 U. S. 582; *State Tax Commission* v. *Aldrich*, 316 U. S. 174.

Compare: *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Pearson* v. *McGraw*, 308 U. S. 313; *Graves* v. *Schmidlapp*, 315 U. S. 657.

VI.

The Question Here Involved Is Substantial.

The State of New Jersey has assumed to impose a tax upon nonresidents of that State, because of the transfer to them of property which at the time their interests vested was neither located nor owned within New Jersey. Even

at the time of their designation in the trust agreement as contingent future beneficiaries, the property had only a fictitious *situs* in New Jersey, its actual and business *situs* being in New York. They have not been taxed upon the original value of the future contingent interests, assessed as contingencies merely, and as of the time when such interests were contingently created, but upon the full present value of the property at the decedent's death, when by their survival of the decedent they became for the first time definitely entitled to ownership of any kind, either present or future. At that time any fictitious New Jersey situs, attributable to the property because of the grantor's domicile at the time of the creation of the trust, had long since given way to the indubitable New York *situs* resulting from the New York trustee's ownership as well as from the actual location of the securities constituting the trust fund.

The amount of excess tax thus imposed upon the share of one of the individual appellants is $8,133.59; and that upon the other is $8,227.99, the difference being due to a variation in tax rates because of unequal interests in other property passing under decedent's will.

While the Supreme Court has considered numerous cases involving the *situs* of trust funds and other intangible property for purposes of taxation, the situation presented by the facts in this case is believed to be new.

It is an established fundamental principle that taxation is unconstitutional when imposed upon subject matter which is beyond the jurisdiction of the State. Controversies wage chiefly around the boundaries of that jurisdiction. The appellants do not challenge New Jersey's jurisdiction to tax the transfer of this fund merely on the ground that such jurisdiction belongs to New York. Apparently New York would have a clear right to tax the transfer of this particular fund, deposited, held and administered in New York City before the execution of the trust deed as well as there-

after. *Curry* v. *McCanless*, 307 U. S. 357; *First Bank Corporation* v. *Minnesota*, 301 U. S. 234; *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193. This in itself will not exclude New Jersey, for it must be admitted that both States might have concurrent rights of taxation. *Curry* v. *McCanless*, *supra*, *Graves* v. *Elliott*, 307 U. S. 383; *Graves* v. *Schmidlapp*, 315 U. S. 657. On the other hand, these cases give no support to a claim that New Jersey may tax the transfer merely because New York has adopted a policy of exempting from taxation property deposited within its borders by nonresidents.

The question remains, what jurisdiction has New Jersey to tax a transfer of this property that took place after the New Jersey grantor had parted with his ownership? *Provident Savings Association* v. *Kentucky*, 239 U. S. 103, is a somewhat analogous case, indicating that any former jurisdiction has been lost.

The importance of the distinction between contingent and vested future interests from the point of view of transfer taxation is illustrated by *Coolidge* v. *Long*, 282 U. S. 582 and *Binney* v. *Long*, 299 U. S. 280, holding that a statute may not constitutionally impose a transfer tax upon the falling into possession of a vested future interest theretofore created, but such a tax may be imposed where the future interest has been only contingent. This appears equivalent to a conclusion that the taxable transfer in the case of a contingent interest does not take place before the happening of the event which determines the contingency. The contingency was not determined in the present case however until the death of the grantor marked the appellants as the survivors, and at that time New Jersey's jurisdiction over the property had been clearly lost. The argument of the New Jersey Vice Ordinary, adopted by the higher courts, that there was some sort of taxable transfer at the time of the execution of the trust agreement, is inconsistent with

Binney v. *Long*, *supra*, as well as with the assessment of the transfer to the appellants at the full value of the property at the date of the grantor's death.

The decision appealed from is not supported by either *Curry* v. *McCanless* or *Graves* v. *Elliott* or *Graves* v. *Schmidlapp*, *supra*, because in each of those cases there was a transfer by act of the decedent at the time of his death, either by exercise of a power of appointment or by termination of a power of revocation. But in the present case the rights of the parties were unalterably fixed, as far as the decedent's ability to change them was concerned, by the trust deed, which was irrevocable, and contained no power of appointment. Nothing happened therefore on decedent's death to give New Jersey any domicillary jurisdiction over the trust fund in New York.

Moreover, New Jersey bore no such relationship either to the property or to the transfers thereof as would enable it to impose a tax on the theory of benefits received in protection or enforcement of rights. *State Tax Commission* v. *Aldrich*, 316 U. S. 174. The documentary evidences of the property were always in New York, and the transfers were effected solely by virtue of the laws of New York, where the trust agreement was executed and by the laws of which it was by its express provisions to be governed.

The facts in *Pearson* v. *McGraw*, 308 U. S. 313, although similar in some respects, are also materially different in important particulars. The interests which there passed to the beneficiaries under the trust deed were not contingent, and the most valuable, according to the assessment, were not even future. The income was given for life immediately to the grantor's son and daughter and their respective spouses, by name, and the principal thereafter to the grantor's named grandchildren; and although provision was made for afterborn grandchildren and for substitutional gifts in case any should die, these future inter-

ests were not contingent like those created by the trust deed of the present decedent. Moreover it does not appear that any of the trust beneficiaries in the *Pearson* case were nonresidents.

The circumstance that the trust agreement was found to have been made in contemplation of death cannot in itself create jurisdiction which does not otherwise exist. Its only significance is to make the statute applicable textually, for the transfer was not by either will or intestacy.

The attempt of New Jersey to tax the transfer of the trust found to the appellants when the fund was actually outside of the borders of the State and had no longer even a domiciliary situs therein, is a violation of the fundamental constitutional principle reiterated in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, and *Frick* v. *Pennsylvania*, 268 U. S. 473.

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APPENDIX "A".

OFFICIALLY REPORTED 129 N. J. Eq. 186

Filed: February 14, 1941

Conclusions.

NEW JERSEY PREROGATIVE COURT.

No. 5452

Conclusions

In the Matter

of

Transfer Inheritance Taxes in the Estate of GEORGE W. E. ATKINS, Deceased

Between

CENTRAL HANOVER BANK & TRUST COMPANY, Executor &c., et al., *Appellants*,

and

J. H. THAYER MARTIN, State Tax Commissioner, *Respondent*

Transfer Inheritance Tax Appeal on Final Hearing

Messrs. Child, Riker, Marsh & Shipman, for appellants.

Mr. David T. Wilentz, Attorney General.

Mr. William A. Moore, Assistant Attorney General, for respondent.

BUCHANAN, *V.-O.*

This is an appeal from the transfer inheritance tax levied in the estate of George W. E. Atkins, deceased, who died testate, domiciled in this state, November 9, 1936. Tax was assessed against the transfer under his will of property

valued at a little less than $200,000.; also against transfer of property passing under an *inter vivos* trust deed executed and delivered on May 16, 1929; and also against transfers made to decedent's two sons under certain "refund annuity" agreements between decedent and certain respective insurance companies.

There is no dispute as to the tax on the testamentary transfers, nor as to amounts or computation as to the other transfers; the only questions in issue are (1) the taxability of the transfers under the trust deed, and (2) the taxability of the transfers under the refund annuity agreements.

The Refund Annuity Transfers.

First as to the transfers under the refund annuity agreements. There were six of these agreements, or "policies," with two insurance companies, all essentially alike, purchased in the period between July, 1932, and October, 1935. The decedent paid a lump sum, called the "capital investment", to the insurance company and received in consideration thereof an agreement whereunder the company bound itself to pay to the annuitant certain fixed, equal, monthly payments during his life, and if the annuitant should die before receiving monthly payments aggregating the amount of the "capital investment", to continue the monthly payments after his death until the total of said payments equalled the amount paid in; the payments, (if any), subsequent to Mr. Atkins' death were to be made to his two sons, as beneficiaries designated by Mr. Atkins; and the right was reserved to Mr. Atkins to change the said beneficiaries during his life.

It seems clear that the transfers to the two sons, under these contracts, are gifts *inter vivos* "made in contemplation of the death of the donor"; and they are also gifts "intended to take effect in possession or enjoyment at or after such death." Under our statute they are therefore taxable in either of those aspects.

That these are, in substance and effect, transfers by the decedent, although the actual payments to the sons are to be made by the insurance company, is obvious. The payments (if any) to be made to the sons, constitute repayment by the

company of the equivalent of so much of the capital sum invested by decedent as has not previously been repaid to the decedent himself. That which is to be paid by the company to the sons is in substance and effect, simply that which the decedent has paid to the company and directed the company to pay to the sons. If otherwise taxable, these transfers are not saved from taxability because made through the medium of a third party. *In re Gemmell*, 123 N. J. Eq. 315, and cases cited at page 321, 197 Atl. Rep. 428.

By the express terms of the contracts the sons take nothing thereunder until the death of the annuitant grantor; that which comes to them comes only at and after his death. It is a supererogation to say that these gifts were intended by decedent to take effect in possession or enjoyment at or after his death. He intended that which he expressly provided.

It is equally clear that these (contingent) gifts to the sons were made by the donor in contemplation of his death. It may be conceded that he had no apprehension of death other than as an event certain to occur at some time in the indefinite future. A transfer is taxable under that clause, however, if made in and because of such contemplation of death as that which leads to testamentary disposition—if made with the intent and purpose that it be in lieu of testamentary disposition. *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 800; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235.

That these transfers to the sons in the instant case were made in lieu of testamentary disposition is indisputable; they are specifically, expressly and solely, provisions as to the *post mortem* disposition of a part of the assets of his estate—the value, at his death, of the unpaid instalments under the contracts.

Appellants contend that these transfers are not taxable because the primary purpose and motive of the decedent in taking out these contracts was to make provision for himself for life, not to provide a distribution of his property after his death.

If this contention were sound it would of course be of no practical benefit to appellants, for it still would remain true

that the gifts would be taxable as being intended to take effect in possession or enjoyment at or after death? However it is not sound, and hence not efficacious to preclude taxability of the gifts as made in contemplation of death.

As pointed out, and held, in *Nicholas* v. *Martin*, *supra*, it is not a requisite of taxability on this ground, that the transferor's primary object and purpose in making a transfer which is in fact made and intended as in lieu of a testamentary disposition, should have been to make provision for the *post mortem* distribution of his estate (or a part thereof); it is sufficient if he in fact, regardless of what may have been his primary object in so doing, makes a transfer which is in fact made and intended as in lieu of a testamentary disposition.

Moreover, in the instant case, this contention of appellants is unsound, because we are here concerned not with the provision for repayment from the company to the annuitant during his life, but simply with that part of the transaction which provides for the contingent, eventual *post mortem* payment to the sons. It is only this latter transfer which has been taxed. If the contract had not contained this provision, but had instead provided that any portion of the capital investment which had not been repaid to the annuitant during his life, should at his death be paid to his estate,—his executors or administrators,—there would have been no taxable transfer in and by the contract. In that case such unrepaid balance would pass under his will and be taxable as a testamentary transfer. The decedent however did not so provide; instead he made a conscious choice between such provision and a provision for *post mortem* distribution to his sons, decided in favor of the latter, and acted accordingly—thus making, by this provision of the contract, a transfer intentionally in lieu of testamentary disposition,—taxable as made in contemplation of death under the established intent and meaning of the statute.

Appellants rely on the principle, set forth in such cases as *In re Kellogg*, 123 N. J. Eq. 322, 197 Atl. Rep. 263, (and the cases therein cited on p. 325), that where a transferor makes *inter vivos* an absolute, immediately effective transfer of property in exchange for an agreement by the trans-

feree to pay an annual sum to the transferor during the transferor's life, the transfer is not taxable (under the "intended to take effect at death" clause), unless the annual sum to be paid to the transferor comes from or is connected with or dependent upon the corpus or income of the actual property transferred.

That principle, and those cases, obviously have no application here. Those cases deal with the taxability of a transfer from the transferor to the original transferee where the transferor retains or receives back something which is similar to the beneficial enjoyment, during his life, of the property transferred,—thus raising the question as to whether or not the transferor intended the ultimate transfer of actual beneficial enjoyment to the transferee to take place only at or after the transferor's death. They do not involve any promise by the transferee to pay over or transfer something *to a third party at the transferor's death*. The present case does; and the thing which the transferee agrees to pay over to the third party is a part of, or "identifiably tied up with", and dependent upon, the property transferred by the transferor to the original transferee.

The present case is in effect, (insofar as concerns that portion of the original transfer which is not repaid to the transferor during his life), a (contingent) transfer, through an intermediary, to the third party to take effect only at the transferor's death.

The situation is no different as to taxability even if it be deemed that the sum or amount which the insurance company agreed to pay to the sons, is not actually a part of, or identifiably tied up with, the thing transferred by the annuitant to the insurance company. The transferor, under the agreement of the insurance company, had a right to have repaid to himself or to his estate, the amount of the capital investment in equal annual payments,—because there was reserved to him the right to change the *post mortem* beneficiaries. That right, at the moment of the transferor's death, was of the value of the balance then remaining unpaid; and that right (and the value thereof) actually ultimately passed to the two sons only at the annuitant's death,—because he had not until then lost the right to revoke the beneficence to the son. *Cf. Kings County Trust*

Co. v. *Martin*, 121 N. J. L. 290, 2 A. 2d 187; *Graves* v. *Elliott*, 307 U. S. 383.

This also disposes of the contention put forward in appellants' brief, to the effect that the interest passing to the sons is not taxable because its passing to them was only contingent, and that, under the mortality tables and their father's age and expectancy of life, the value of their expectancy of receiving anything thereunder was *nil*, at the time their father made the agreements.

Irrespective of all this of course, the transfer to the sons is still taxable as made in contemplation of death.

Appellants further contend that these transfers to the sons are not taxable, because (they say) proceeds of life insurance policies passing to named beneficiaries are exempt from taxation and because these annuity agreements are (they say) life insurance policies. In that contention this court cannot concur. The applicable statutory provisions are those found in R. S. 54:34-4, *b* and *c*; (subsections *f* and *g* were not passed until 1939).

These statutory provisions for exemption existed in precisely the same form prior to the Revision of 1937 and were in force and effect during the period of the making of the annuity agreements in question, and also at decedent's death. They are not, however, applicable to the situation *sub judice*, because this situation does not involve any trust deed, trust agreement or trust fund, and especially it does not involve any trust fund resulting "from the proceeds of contracts of insurance * * * insuring the life of decedent and payable at or after the death of decedent to the trustee" under such trust agreement.

Not only do the contracts under consideration create no trust fund, nor provide for any payment to any trustee nor for the benefit of any *cestui que* trust, but they are not even "contracts of insurance * * * insuring the life of decedent."

It may be assumed for the sake of argument that the transfer to named beneficiaries, of proceeds of life insurance policies, would not be taxable, even though under such policies the insured retained the right to change the beneficiaries—*Cf. In re Gemmell*, 123 N. J. Eq. 315, 197 Atl. Rep. 428, at pages 319 *et seq.*; but the contracts in ques-

tion are not life insurance policies. A life insurance policy is a contract whereby the insurance company agrees to insure or indemnify the beneficiary against the death of the insured; it is a contract by which the insured protects the beneficiary against loss accruing by the early or premature death of the insured. The refund annuity contract such as we are here considering is very different. By it the insurance company agrees to repay to the annuitant, in instalments during his life, the amount paid in by him to the company, and if at his death there be a balance unpaid to him, to pay that balance to the person designated by the annuitant to receive the same. It is a contract by which the annuitant protects *himself, during his life*, by making an investment which will assure the receipt *by himself*, of an adequate or desired annual sum during his life, with the further assurance that if he should die prematurely, his estate or those whom he desires to receive distribution thereof, will not suffer the loss of the repayment he has himself not yet received. In the judgment of this court this is not a life insurance policy.

The question is *res nova* in this state. There are authorities *pro* and *con* in other jurisdictions, but those in accord with the conclusion herein reached are deemed to have the support of better logic and reason.

Reference is made by appellants to the fact that the amounts passing to the sons under these agreements, constitute only a small part of decedent's estate. If by this it is meant to suggest that the transfers are for that reason not taxable, the suggestion is unsound. The statute provides that transfers *inter vivos* of a material portion of the transferor's estate, under certain circumstances shall be *prima facie* deemed to have been made in contemplation of death. But there is no provision, express or implied, which says that a transfer which is in fact made in contemplation of death or intended to take effect at or after death, shall not be taxable unless it be of a material portion of the transferor's estate. Moreover the transfers to the sons in the instant case aggregate some $28,600.—a sum which is by no means *de minimis*, either actually or in relation to the assets of approximately $200,000. at that time owned by decedent.

The Trust Deed Transfers.

Next as to the taxability of the transfers under the deed of trust. This deed was executed and delivered by decedent on May 16, 1929, in the State of New York. Admittedly the entire property conveyed thereby consisted of intangible personalty, the legal title to which, and the beneficial ownership of which, was in the grantor, who was then and for a considerable time prior thereto had been a domiciled resident of New Jersey. The "securities" or paper evidence of ownership of this intangible personalty were at that time, and for some time previously, and at all times subsequently until the death of decedent, physically located in the State of New York. Prior to the making of the deed they had been in the custody of an agent of said owner. The trustee was a corporation of, and having its office in, the State of New York. The trust deed provides by its express terms that it is to be construed according to the laws of the State of New York. Decedent, grantor of the trust, continued to be domiciled and resident in New Jersey at all times subsequent to the execution and delivery until and at the time of his death.

The trust deed provided in essence, for an equitable life estate to the grantor for life, and thereafter to his wife for life (if she survived him), and that the corpus in remainder be paid to the grantor's two sons if living—with substitutionary gift over in case of their prior death. The wife predeceased the grantor; the two sons both survived him.

The tax levied and assessed with respect to the transfers under this deed of trust, and as to which the present appeal is taken, was as to the transfers of the remainder interests to the two sons.

The specifications of alleged error, or the grounds of this appeal, as set forth in the petition of appeal, may be more succinctly set forth as follows:

The property which comprised the trust fund was located outside the territorial limits of New Jersey at the time of execution of the trust deed; the trust deed was executed outside of New Jersey; the legal title to the property transferred by that deed was transferred to a corporation domi-

ciled in New York; the legal title to the property and the possession thereof has at all times since remained in that trustee entirely outside of New Jersey; and under these circumstances

a. the transfer of the trust property is not made taxable under the provisions of our statute.

b. the state of New Jersey had no constitutional power to tax the said trust property because the *situs* thereof at the time of taxation was not within the territorial limits of this state.

c. if the provisions of our statute authorize or direct the taxation of the property of the trust fund, then such provisions and such taxation are unconstitutional, because a state has no power or jurisdiction to tax property, or the transfer of property, when such property is located, or such transfer is made, outside the limits of its own territorial boundaries.

Not much time need be spent in considering b. above—inasmuch as no tax was here imposed on the *property*. The tax appealed from was imposed upon the *transfer* of certain interests in property.

Moreover, even if the tax had been imposed on the property itself (presumably, appellants mean the property which was conveyed by the grantor to the trustee), the allegation is unsound. That property was admittedly *intangible* personalty; and the power to tax such property inheres in the state of the domicile of the owner thereof. *Curry* v. *McCanless*, 307 U. S. 357, at 368, and 370.

As to a., above—reference to the provisions of the statute will show that this allegation—(that the statute does not purport to impose a tax such as that here *sub judice* in the situation and circumstances present in the instant case)—is without foundation. On the contrary such a transfer clearly comes within the scope of the express terms of subsection first, of section 1, of the statute in force and effect at the date of the transfer and the date of the transferor's death—P. L. 1909, C. 228, p. 325, as amended. (It is also

to be noted that it comes within the scope of the express language of the corresponding sections of the present statute—R. S. 54:34-1 c. and d.)

The statute (see section 1 thereof) expressly imposes tax, *inter alia*, upon every transfer of any property of the value of $500., or of any interest therein or income therefrom, made by a resident, by deed made in contemplation of the grantor's death or intended to take effect in enjoyment at or after such death. Under the express words of the statute therefore, the tax is imposed on the transfers made by the present deed of trust, because that deed was made by a resident of New Jersey; it transferred to the trustee property of the value of over $500., and also transferred to the two sons contingent equitable interests in remainder in that property (which interests were also of the value of over $500.); and these transfers of the equitable interests to the two sons were made by deed made in contemplation of the grantor's death and also they were intended to take effect in enjoyment or possession at or after such death.

That these transfers to the sons were intended to take effect in possession or enjoyment at or after the grantor's death is obvious; the trust deed expressly so provides, and hence necessarily intends. That they were made in contemplation of the grantor's death is equally beyond doubt. The grantor was aged 79 at the time he made the deed; the deed provides for the *post mortem* distribution of the trust fund; the trust fund comprised some $390,000. or approximately two-thirds of his estate; and the deed was executed contemporaneously with the execution of his will which provides likewise for the *post mortem* distribution of the bulk of his testamentary estate to the wife for life with remainder to the sons. See *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd, 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 809; aff'd, sub nom. *Hartford* v. *Martin*, 122 N. J. L. 283, 4 A. 2d 31; *In re Fischesser*, 14 N. J. Misc. 815, 187 Atl. Rep. 648; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235. The nature of these transfers is at least tacitly admitted by appellants; who likewise do not controvert the proper ap-

praisal, computation and levy of the tax, if the transfer is constitutionally subject to the operation of the statute.

It must needs also be admitted by appellants,—and indeed they do not contend otherwise,—that there is nothing in the provisions of our statute which expressly or impliedly exempts from taxation, such transfers as the one here under consideration.

The real contention of appellants is that the transfers by the trust deed are not subject to the taxing power of New Jersey because that deed and the transfers thereby made were made and took place outside the territorial boundaries of this state; were made to a non-resident trustee; by a deed which expressly provided it should be construed according to the laws of New York; and the property transferred was then, and at all subsequent times, outside the territorial boundaries of this state; further, that the transfers of interest to the sons did not take place until the death of the grantor, inasmuch as the interests given to the sons were contingent upon the sons surviving the grantor, and until his death leaving them surviving, no gift vested in them; that at grantor's death he was not the owner of the property conveyed by the trust deed, (legal title to which was then in the New York trustee); hence New Jersey could not validly impose a tax upon that transfer at the grantor's death, notwithstanding the statute purports so to do.

The power of a state to impose a tax upon property, or upon the owner of property, rests upon the dominion and control of that state over that property or over the owner. See *Curry* v. *McCanless*, 307 U. S. 357, at page 366.

Although there is of course a difference between a tax on property and a tax on the transfer of property, that difference is not material on this matter of sovereignty based on control. A state which by reason of physical control over property within its borders, has the power to tax that property, must equally have power to tax the transfer of such property, because by reason of its physical control, it can (except as forbidden by the federal constitution), impose conditions upon, or prescribe the methods necessary to accomplish, or even forbid completely, the transfer of that property. *Cf.* statutes forbidding the ownership of real

estate by aliens, or by foreign corporations, and the like; also the statutes prescribing necessary requisites for accomplishing conveyance, by will or by deed, of property within the state's borders.

Since it is the state in which the property is situate which has the power and right to prescribe the requisites for accomplishing a transfer of that property, it seems clear that if that state does not include among such requisites some provision as to the place *where* that act of transfer must necessarily be made in order that the transfer be valid and effectual (assuming that such a provision would be constitutional) it is utterly immaterial where that act of transfer is performed so long as it complies with such other requisites as the state of *situs* has prescribed. Conveyances of real property in New Jersey are constantly made both by deeds executed outside of this state and by wills of decedents who are non-residents of New Jersey, and no one has ever suggested that their validity might be open to question because they were not made in the state of New Jersey; on the contrary, that their validity is not subject to question on that ground is indicated by the statutory provisions for the recording in this state of foreign wills and for the taking of acknowledgments in foreign states of deeds conveying New Jersey real estate, and the like.

Inasmuch, then, as New Jersey, having the power to prescribe the methods and requisites necessary to accomplish a valid transfer of property within its borders, and the power to tax such a transfer has not included in the necessary requisites for effectuating a valid transfer any requirement that the act of transfer must be performed within this state, it follows that an act of transfer performed outside this state, if it in all other respects complies with such provisions as New Jersey has made requisite to effectuate a valid transfer, does accomplish a valid transfer and a statutory tax imposed by New Jersey upon transfers of property located in this state will apply to and be operative upon that transfer just as much as on a valid transfer effectuated by an act performed in New Jersey.

Therefore the fact that in the instant case the act effectuating the transfer was performed in New York, by the exe-

cution and delivery there of the trust deed, is a matter of no moment so far as concerns the validity of the tax. No constitutional provision is cited, or known, which would make it requisite to the validity of a tax imposed by New Jersey upon the transfer of New Jersey property, that the act of transfer must take place in New Jersey; our taxing statute provides for no such limitation; there appears no logical reason, nor any reported adjudication by the courts of this state or of the United States, to support the contention that such a limitation should be inferred. The only authority proffered by appellants in support of their contention in this behalf, is the case of *Cutts* v. *Najdrowski*, *123 N. J. Eq. 481, 198 Atl. Rep. 885, and the case of *MacClurkan* v. *Bugbee*, *106 N. J. L. 192, 150 Atl. Rep. 443—but neither of these cases in fact affords any such support.

In the *MacClurkan* case, a deed of trust, irrevocable for five years, was made in Illinois by a grantor who then resided in Illinois, which comprised no property located in New Jersey. The question before the court was as to the validity of a transfer tax by this state on the transfer made by a non-resident, of a contingent interest which became vested at the death of the grantor, the grantor having meanwhile become a resident of New Jersey and died within the five-year period of irrevocability. Since the deed when made comprised no property located in New Jersey it did not come within the scope of the provisions of the New Jersey statute relating to tax on transfers made by non-residents. It was held that it also did not come within the scope of the provisions for the taxation of transfers by residents, because the trust deed when made was made by a non-resident, who, though she later became a resident, never had any power or control over the transfers provided in that deed, and although the contingent life estate vested while she was a resident, it did so by reason of the deed of trust made when she was a non-resident, and not by reason of any act or failure to act by the grantor while such resident, and not because of any privilege granted, or power of nullification withheld, by the state of New Jersey. It is clear therefore that, notwithstanding the opinion includes considerable discussion as to the circumstances in which a

state has the constitutional right or power to impose a transfer tax, the decision does not in any wise hold, and cannot be deemed authority for the principle that, a transfer of property located in this state, made by an owner domiciled in this state, cannot validly be taxed by this state if that transfer is made in another state.

In the other case cited by appellants—*Cutts* v. *Najdrowski, supra*—the factual situation was that L., a New Jersey resident, who owned a bank deposit standing in his name in a New York bank, caused the account to be changed to the credit of "L. in trust for J.". The question was whether this act of L. constituted or accomplished a valid transfer to J. of the ownership of the account. The actual decision was that under the law of New York it did constitute such valid transfer; and that the question of the determination of the nature, validity and effect of the transaction was one which was governed and controlled by the law of the State of New York. It does not appear from the opinion *what* the act of transfer was, nor—except by possible implication—that it *was* made in New York; and it is not clear from the opinion whether the reason for holding that the law of New York controlled was because the act of transfer was made in the State of New York, or because the court found that the property transferred (notwithstanding it was intangible—a chose in action), had a *situs* in New York, or both. All this however is immaterial. So far as concerns our present inquiry, the decision does not in any wise hold nor purport to hold that the State of New Jersey did not have the power to tax that transfer—does not have the power to tax a transfer of intangibles owned by a New Jersey resident where the act of transfer is performed in New York. The most that it holds is that the nature, effect and validity of an act of transfer performed in New York is to be determined by the law of New York.

Applying that holding to the instant case simply means that the nature, effect and validity of the trust deed here being considered, is to be determined by the law of New York (where it was executed and delivered). There is however no controversy as to the nature, effect or validity of the deed. Concededly it was a valid deed and comprised and

effected a transfer of the legal title to the trustee and transfers of the equitable interests to the beneficiaries as therein specified. (No proof was in fact made as to the law of New York in this regard, and hence it is presumed that that law is the same as the law of this state.) The question here is whether those transfers made by an owner-grantor domiciled in New Jersey, are beyond the power of New Jersey to tax, simply because they were made in New York. The *Catts* case is in nowise authority one way or the other.

(In *Hasbrouck* v. *Martin*, 120 N. J. Eq. 96, 183 Atl. Rep. 735, cited by respondent, there was no question raised by the parties nor considered by the court as to the power of this state to impose the tax. It cannot therefore be deemed authority one way or the other, as to the present dispute.)

On the other hand, in *Carr* v. *Edwards*, *84 N. J. L. 667, 87 Atl. Rep. 132, a tax was levied by New Jersey in respect of the testamentary transfer of the estate of a non-resident testator which included stocks in New Jersey corporations, and it was held that the law of New Jersey controlled the right of succession to such property of a Massachusetts decedent as had its *situs* in this state, and that our transfer inheritance tax act intended to, and did, tax that transfer of that property. It is a determination therefore, by our highest court, that the state of the *situs* of property has the right to tax the transfer of such property, notwithstanding that the act effectuating transfer, (in the *Carr* case the Massachusetts will) occurs outside of this state. In the instant case the act of transfer (the execution of the deed of trust) occurred in New York but the property thereby transferred (being intangible personal) had its *situs*, as we have seen, in the domicile of its owner—New Jersey.

A final and controlling authority on this point is the determination of the United States Supreme Court in *Curry* v. *McCanless*, *supra*. The court there said (p. 366), that the jurisdiction of a state to impose upon the owner of intangibles a tax on the use and enjoyment of rights therein, measured by their value does not depend on *any factor other* than the domicile of the owner within the taxing state; and, again (p. 370), that inasmuch as the state of domicile of the owner of intangibles may lawfully tax such intangible prop-

erty in the hands of such owner, "we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state." This obviously excludes any necessity that the act of making the transfer must be performed in the taxing state. It can make no material difference in this regard whether the act of transfer be by will or by deed.

It is deemed therefore that the fact that the deed of trust in the instant case was executed and delivered in New York, constitutes no ground for holding the present tax invalid.

There is no greater force to the contention of appellants that the present tax is invalid because of the fact that the deed of trust was made to a trustee which was a corporation of New York and located and doing business solely in New York, and the transferees of the equitable interest were non-residents. The statute contains no such limitation, and no authority whatever is submitted by appellants. No logical basis for such a contention can be perceived.

Neither is it at all material to the present issue, that the deed of trust provides that it shall be construed according to the law of New York. The mere fact that the deed contains that provision does not deprive New Jersey of the power and right to tax the transfers therein provided. It might be that if, construed according to the law of New York, that deed was invalid or the transfers therein provided were invalid or were of a different nature and effect than if construed according to the law of New Jersey, the right of New Jersey to tax under the provisions of our present statute might be affected; but no such situation exists. There is no claim whatever that there is any difference under the law of New York, as to the validity, nature and effect of the deed of trust or the transfers therein specified, than under the law of New Jersey.

We come now to the contentions more strongly stressed by appellants—*i. e.* (a) that at the time the deed was made the property thereby transferred to the trustee was located outside the territorial boundaries of New Jersey, and so continued at all times thereafter, and hence New Jersey had

no power to tax the transfers made by that deed; (b) that the interests given to the sons were contingent and did not vest until the grantor's death, and hence that no transfer to the sons (being the transfer on which the present tax was levied and assessed) took place until the death of the grantor; (c) that at the time of grantor's death he was not the owner of the property transferred by the trust deed and hence that property was not located in New Jersey and therefore New Jersey had no power to tax that transfer thereof.

First as to the *situs* of the property comprised in the trust deed, at the time of the making of that deed. That property, as has been said, was comprised entirely of intangibles—securities—owned, both as to legal title and beneficial interest, by the grantor, but the paper evidences of which were in the custody and possession of a New York corporation (the same one named as grantee in the deed), as agent of the grantor, and which had so acted as such agent for some considerable time, keeping them in safe custody, collecting the income for grantor and from time to time making sales and purchases as directed by the grantor.

It has been said in divers cases that the legal *situs* of intangibles, for the purpose of taxation, is the state of domicile of the owner—this on the basis of a convenient fiction by which, in analogy to the principles applicable to the taxation of tangibles, a physical *situs* has been attributed to intangibles which in fact do not have, and cannot have, a physical *situs*. The actual basis for taxation in respect of intangibles is the control over the owner thereof by the state in which such owner is domiciled—and the duty of such citizen to contribute to the support of the government of his state. But, whatever the theory, it is certainly firmly established that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner "a tax on the use and enjoyment of rights in intangibles, measured by their value." *Curry* v. *McCanless*, *supra*, at pages 367, 366, 370. And this includes the right to tax the *transfer* of intangible property or of an interest therein, whether such transfer is effected by an act

in that state of domicile or an act in some other state. *Id.*, page 370. *Hopper* v. *Edwards*, 88 N. J. L. 471, 96 Atl. Rep. 667, cited by appellants, of course could not prevail over *Curry* v. *McCanless*, *supra*, but in fact it is in nowise authority for the proposition that the state of domicile of the owner has no power to tax such transfer where the paper evidences are located in another state. It decides, at most, (i. e. assuming that the property involved in the transfer there under consideration was intangible property) that New Jersey, where the evidences of the intangibles were located, could validly tax the transfer of the intangibles, notwithstanding the owner-transferor of the intangibles was domiciled in New York, and notwithstanding New York may have validly levied a tax on the same transfer. In other words, it decides that, under the circumstances of the instant case, New York can validly tax, but it does not decide that New Jersey cannot validly tax.

It has been held in a number of cases (see those cited in *Curry* v. *McCanless*, *supra*, at page 368) that where an owner of intangibles who is domiciled in one state but has carried on business in another state and in so doing "established a business *situs*" in such other state of some or all of his intangibles, tax may be imposed by the state of such "business *situs*" in respect of such intangibles. Appellants contend that such was in fact the situation in the present case—that the grantor had established prior to the execution of the trust deed, a "business *situs*" in New York for the intangibles conveyed by that deed, so that they were taxable by New York and were not taxable by New Jersey. This contention is unsound.

In the first place it may be doubted that the evidence in this proceeding establishes that any such "business *situs*" had been acquired by any of the intangibles conveyed by the deed of trust, as to enable New York to tax. All that the evidence shows is that the paper evidences of ownership of the intangibles had been for some time prior to the deed in the physical possession of an agent of the grantor in New York, who had kept them in safe custody for the owner, collected the income, and from time to time made certain sales and purchases as such agent.

In any event, this same situation existed in the recent case (1939) of *Pearson* v. *McGraw*, 308 U. S. 313, and it was held that the state of domicile of the owner of the intangibles had constitutional right and power to tax a transfer of the intangibles made by the owner aforesaid. Obviously, then, it must have been deemed by the court either, (1), that the intangibles had acquired no such business domicile as to enable tax to be imposed by the state where the evidences of the intangibles were located, or, (2), that the state of domicile could tax, notwithstanding the other state also had power and right to tax.

No case is cited by appellants, nor has come to the attention of this court, holding that the state of domicile does not have power and right to tax where a "business *situs*" has been acquired by intangibles such as to give the state of that *situs* the power and right to tax. On the contrary, the Supreme Court of the United States says in *Curry* v. *McCanless*, *supra*, at page 370, "This court has never denied the constitutional power of the trustee's domicile" (the trustee being the owner of legal title to intangibles) "to subject them to property taxation" and "we perceive no ground for saying that the Fourteenth Amendment forbids the state" (of that trustee's domicile) "to tax the transfer of it" (the intangible property) "or an interest in it * * *." And again, at page 368—"it is undeniable that the state of domicile is not deprived by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." The factual situation in that case was that an owner domiciled in Tennessee had conveyed to an Alabama trustee legal ownership of a trust fund of intangibles (for her own benefit for life) reserving to herself the power to dispose of the trust fund by her will—which she did. The court held that both Tennessee and Alabama had power and right to tax the transfers made by that Tennessee will.

Again in *Graves* v. *Elliott*, 307 U. S. 383, a Colorado citizen transferred intangibles to a Colorado trustee by deed of trust, reserving power to revoke. The grantor later be-

came domiciled in New York and died without revoking. Colorado levied a tax on the transfer occurring at death (as of course Colorado might lawfully do, under the authorities hereinbefore mentioned—being the state of domicile of the owner of legal title to the intangibles). It was held that New York also might lawfully levy tax on the transfer which occurred at the death of the grantor consisting of the re- [fol. 41] linquishment of the power to revoke—that right of revocation being a potential source of wealth to her and having the attributes of property, and being an interest owned by her which she transferred or relinquished at her death, she being then domiciled in New York.

Although it is thus held by the United States Supreme Court that there is no constitutional prohibition against such "double taxation," it may be noted that in the present instance New York has not sought to impose tax on the transfers here under consideration.

It is further to be noted that the highest court of this state has held that this state may validly impose a tax upon intangibles owned by a corporation domiciled in this state, notwithstanding those intangibles have acquired a "business *situs*" in another state. *Newark Fire Ins. Co.* v. *State Board &c.*, 118 N. J. L. 525, 193 Atl. Rep. 912; aff'd 120 N. J. L. 224, 198 Atl. Rep. 837. This decision was affirmed by the United States Supreme Court, 307 U. S. 313, but that court was equally divided as to the ground of affirmance. However the decision of our highest court, not overruled by the United States Supreme Court, is of course controlling here.

The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title in the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, and also a transfer, at the same time, of an equitable interest of contingent remainder therein, to the two sons. Under the authorities cited, New Jersey had the power and constitutional right to tax either or both of these transfers.

The tax here appealed was levied and assessed on the transfers to the sons. Appellants say that these transfers, being contingent, did not occur until the happening of the contingency and that New Jersey had no right or power to

tax them because at that time New Jersey was not the state of domicile of the owner of the intangibles—ownership of the legal title being then in the New York trustee.

It may be here stated that it seems clear that if the state of domicile of the owner-grantor of intangibles has the constitutional power to tax the transfer of the legal title to those intangibles, it must likewise have the power to tax the transfer of any lesser legal interest than absolute ownership, and to tax the transfer of equitable interests as well as legal interests therein. No logical basis for any differentiation in this regard can be perceived. If the transferor owns the complete and absolute, legal and equitable title in this intangible personalty (as he did in the instant case), then he owned each and every interest therein less than the full and complete legal and equitable title; and since the whole and complete ownership was that of intangible property, every lesser part or interest would also necessarily be intangible property, and the state of domicile of such owner-grantor can constitutionally tax the transfer of any partial legal or equitable interest in the intangibles just as well as it can tax the transfer of the complete legal and equitable title.

That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency is not true. It cannot be controverted that there *was* a transfer of interest from the owner-grantor to the two sons; that it was made *by* the owner-grantor; and that the *only act* of the owner-grantor in making that transfer was the execution and delivery by him of the deed of trust. That deed was irrevocable, and after its execution and delivery there was no act by the grantor, and no failure to act by him, which in any wise did, or could, have any operation or effect in effectuating or preventing the transfer. By the deed he made a transfer of the interest in remainder, and thereafter he had no control whatever over that interest. Thereafter that interest must necessarily vest, at his death, in one or other of the alternative contingent remaindermen—and that by operation of the

deed which he had made. It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; but it is inescapable that *he* made the transfer; and that he made it *at and by* his execution and delivery of the trust deed; and that that execution and delivery was the *only* thing he did in making the transfer.

Since it must be conceded that a transfer to the sons did occur; that it was effected solely by the trust deed; that that deed was made solely by the owner-grantor; that from the *moment* that deed was executed and delivered, it and the transfers therein and thereby made were utterly beyond any and all power of the grantor to revoke, amend or in any wise control, it necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him at the time he executed and delivered the deed; and, since at that time he was domiciled in New Jersey, New Jersey has the right to tax that transfer, notwithstanding the interest so transferred did not vest in the particular beneficiary until the grantor's death.

At the time the grantor performed the only act (positive or negative) performed by him in the making of the transfer, he had the legal title to the intangibles, and he was domiciled in this state. But more than this—the transfers upon which the present tax has been levied were not transfers of the legal title; they were transfers of interests of equitable remainder, and those interests were intangible property, and hence their transfer was taxable in the state of grantor's domicile even if we should assume that the legal title to the securities was in the New York trustee. Suppose grantor had made a deed of trust conveying the legal title to the securities to the New York trustee in trust for himself, and had thereafter made a deed conveying the equitable remainder to the sons. That equitable remainder would have been intangible property owned by the grantor and would have been taxable either under a property tax or a transfer tax by the state of his domicile. This is precisely the situation, and basis for taxation, in those cases where a grantor has made a *revocable* deed of trust and died without revoking. In such case the grantor's right of revocation and re-acquiring the property constitutes property of the grantor—and obviously intangible property—a trans-

fer of which occurs by the relinquishment or termination thereof at the death of the grantor without revocation. And where such a transfer (by relinquishment or termination) occurs at death, it is constitutionally taxable by the state in which the grantor is domiciled at death. *Kings County Trust Co.* v. *Martin*, *infra*; *Graves* v. *Elliott*, *supra*; *Curry* v. *McCanless*, *supra*.

As a matter of fact the grantor continued to be domiciled in New Jersey at all times therafter until his death—although it is deemed that this fact is not material. The grantor's domicile at the time of his death would be material if, and only if, he had reserved to himself any power of revocation or control over this equitable remainder interest (as in such cases as *Graves* v. *Elliott*, *supra*, and *Kings County Trust Co.* v. *Martin*, 121 N. J. L. 290, 2 A. 2d 187)—but this he did not do.

By the deed of trust he made an irrevocable transfer of the equitable remainder. Although the identity of the particular beneficiaries in whom it would vest was not specified and would not be known until his death, nevertheless it *must vest* in *some* of the contingent beneficiaries named in the deed (for the final, contingent, substitutionary remaindermen therein specified are the heirs at law and next of kin of the grantor). The interest must pass under and by the deed, therefore; it cannot pass under his will or by intestate succession. The transfer is therefore made by the deed.

New Jersey has the right to impose tax on that transfer, for the reasons hereinbefore stated; and New Jersey *has* imposed such tax, by the terms of our statute. It will be noted that the statute imposes the tax on the transfer of *any interest* in property, whether the property is situate within or without this state—where the transfer is made by a resident of New Jersey (and is by will, intestate succession or by *inter vivos* conveyance made in contemplation of death or intended to take effect at or after death). See the statute, §1, first paragraph, and §26. Also, in the case of an *inter vivos* (or testamentary) transfer comprising an estate or interest contingent or defeasible in character, the property in which such interest is created is to be appraised immediately upon the occurrence of the making of the in-

strument of transfer, although the tax on the transfer of the contingent or defeasible interest is not to be levied and assessed until the happening of the contingency. See §3. The tax is on the transfer at the time it is made, though it may be not payable, or even assessable until a later time. *Cf. Renwick* v. *Martin*, 126 N. J. Eq. 564, at pp. 578-9, 10 A. 2d 293; *City Bank Farmers Trust Co.* v. *Martin*, 127 N. J. Eq. 492, 13 A. 2d 852; and *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587, 14 A. 2d 59.

Appellants rely upon the decision in *Carter* v. *Bugbee*, 92 N. J. L. 390, 106 Atl. Rep. 412, as establishing their contention that in the case of a conveyance of a contingent interest which does not vest until the death of the grantor, no transfer occurs until the happening of that contingency and the consequent vesting. That case dealt with the validity of a tax levied under our statute on a transfer of equitable interests in contingent remainder, made by a non-resident of this state in and by an irrevocable deed of trust; comprising shares of stock of New Jersey corporations. It is true that in that opinion it was said, (p. 393) that "there could be no transfer" of the title to the estate in contingent remainder until the occurrence of the contingency—but the court was not there concerned with, nor considering, whether or not any taxable transfer, or taxable step in a transfer, occurred at and by the execution and delivery of the trust deed, and in all probability did not intend to say or to be understood as saying that no taxable transfer or step in a transfer occurred at and by the making of such deed. Furthermore, even if the court did intend its statement to be taken literally and completely, such a broad statement was not necessary to the actual determination as to taxability there made. It was not necessary to go any further than to hold that the transfer did not become complete until the happening of the contingency and that that completion, or that transfer as and when so completed, constituted a transfer at the time of such completion which was taxable and intended to be taxes by the provisions of our statute relating to transfers by non-residents. Consequently so much of the statement in the *Carter* case as was not necessary to the decision there made, and as is contrary

to the generally accepted principles of law, is to be regarded as dictum and not as controlling in the determination of the present case. *Cutts* v. *Najdrowski*, *123 N. J. Eq. 481, at page 482, 198 Atl. Rep. 885.

Although the case of *MacClurkan* v. *Bugbee*, *106 N. J. L. 192, 150 Atl. Rep. 443, is not specific authority as holding that where transfers are made by deed of trust such as in in the instant case, a transfer of the contingent equitable remainder occurs at the time of the execution of that deed, which is subject to the operation of our statute, it would seem that there can be little if any doubt, from what was said by the court in that case, that such would have been so held, if that had been the question then before the court.

The facts and conclusions in the *MacClurkan* case have hereinbefore been set forth in connection with another point in the argument, but it may be added here, in connection with the present point, that the decision holds that where an irrevocable trust deed is made conveying intangibles to a contingent beneficiary, the transfer (from the standpoint of our tax statutes) is made at and by the execution of the trust deed and that if the grantor be not at that time a resident of New Jersey, there is no transfer made taxable under the terms of our statute, notwithstanding that at the time of the happening of the contingency which vests the contingent remainder, such grantor has become and is domiciled in this state. It will be observed therefore that it is essentially in contradiction to the earlier case of *Carter* v. *Bugbee*, if that case is to be understood as holding that *no* transfer occurs until the happening of the contingency, where a contingent remainder is given by irrevocable deed of trust.

If the provisions of the deed of trust herein involved failed to specify a beneficiary for each and every possible contingency, so that there was a possibility that the gift of remainder might fail (because of failure to vest in *any* of the specified contingent beneficiaries), it might be argued that no transfer of that remainder occurred until the happening of the contingency; that until that time the vested ownership of that remainder continued to reside in the grantor and would never pass from him by operation of the

deed unless at that time some one of the specified contingent beneficiaries was alive to take; that if at that time no such beneficiary were alive to take, the remainder would not pass at all by the deed but would pass by the grantor's will or by intestate succession. Perhaps, indeed, it might be argued that even under the actual provisions of the present deed, the ownership of the remainder remained vested in the grantor until the happening of the contingency, because there was no provision in that deed for any prior vesting—not even a defeasible vesting; that therefore no transfer—because no completion of the transfer—occurred until the actual vesting at the death of the grantor.

But even if such a view be accepted, it still remains true that the equitable remainder interest was intangible property; and if it be deemed that the grantor was still the owner thereof until the happening of the contingency and did not transfer it until that time, nevertheless at that time he was still domiciled in New Jersey, and this state has the power and constitutional right to tax that transfer because, as hereinbefore shown, it has such right and power to tax the transfer of intangible property, by the owner thereof, if such owner be then domiciled in New Jersey. The fact that at the time of that transfer of the intangible interest of equitable remainder in the intangible securities, the legal title to the latter was in the New York trustee, does not prevent the taxability by New Jersey of the transfer, by the New Jersey citizen, of that intangible equitable remainder interest still owned by him. *Curry* v. *McCanless*, *supra*; *Graves* v. *Elliott*, *supra*.

It is concluded therefore that the tax in question must be affirmed, both as to that portion based on the annuity refund transfers and as to the portion based on the transfers by trust deed.

APPENDIX "B".

COURT OF ERRORS AND APPEALS.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, George Chew Atkins, and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors-Appellants,

v.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent.

Opinion.

Argued May 20, 1942—Decided September 18, 1942.

The test of a gift in contemplation of death in the statutory sense is whether the determinative motive is of the sort which leads to testamentary disposition. It is requisite that the thought of death be the impelling cause of the transfer. If that be a controlling motive inducing the disposition of the property, the transfer is taxable.

On appeal from a judgment of the Supreme Court.

For the appellants, Riker, Marsh & Shipman (Theodore McC. Marsh, of counsel).

For the respondent, David T. Wilentz, Attorney-General, and William A. Moore, Assistant Attorney-General.

The opinion of the court was delivered by HEHER, J.:

We concur in the view of the Supreme Court that the decree of the Prerogative Court should be affirmed, generally for the reasons expressed in the opinion delivered by the late Vice-Ordinary Buchanan.

APPENDIX "C".

NEW JERSEY SUPREME COURT.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors,

v.

J. H. THAYER MARTIN, State Tax Commissioner, LUTHER A. CAMPBELL, Ordinary, and Thomas A. Mathis, Register of the Prerogative Court, Respondents.

Opinion.

Argued October 7, 1941,—Decided January 5, 1942.

127 N. J. L., 468

On certiorari. Before Justices Bodine, Perskie and Porter.

For the prosecutors, Child, Riker, Marsh & Shipman (Theodore McC. Marsh).

For the respondents, David T. Wilentz and William A. Moore.

PER CURIAM:

The facts in this case have been carefully examined, as well as the argument of counsel. The opinion of the learned Vice-Chancellor reported in 129 N. J. Eq. 186, is a complete refutation of every argument made.

The tax, as assessed, will be affirmed.

We deem it prudent to observe that the test of a gift in contemplation of death in the statutory sense is whether the determinative motive is "of the sort which leads to testamentary disposition." It is requisite that the "thought of death" be the impelling cause of the transfer. If that be a controlling motive inducing the disposition of

the property, the transfer is taxable under the statute. The legislative design was to place testamentary gifts and substitutes therefor in the same succession tax category, and thus to secure equality of taxation and prevent evasion of taxes. The inquiry therefore is whether the gift was essentially testamentary in character. Was it made as a substitute for a testamentary disposition? Was the generating thought of death as distinguished from purposes associated with life? If so, contemplation of death in the statutory intendment was the motivation for the transfer of the property. *Perry* v. *Martin*, *125 N. J. L. 46*.

The evidence reveals that the refund annuity transfer are testamentary in nature, and therefore taxable. And we are in accord with the Vice-Ordinary's view that they also fall into the category of gifts intended to take effect in possession and enjoyment at or after the donor's death, and are taxable on that ground.

Judgment affirmed.

For affirmance—The Chief Justice, Parker, Case, Bodine, Heher, Colie, Dear, Wells, Rafferty, Hague, Thompson, JJ. 11.

For reversal—None.

(129 N. J. L. 127.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last will and testament of GEORGE W. E. ATKINS, deceased, and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually, *Appellants*,

v.

J. H. TRAYER MARTIN, State Tax Commissioner (WILLIAM D. KELLY, Successor), *Appellee*.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

ROBERT McC. MARSH,
JEHIEL G. SHIPMAN,
CLAUDE A. HOPE,
Counsel for Appellants.

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v.

J. H. THAYER MARTIN, State Tax Commissioner (WILLIAM D. KELLY, Successor), *Appellee*.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The appellee has moved to dismiss or affirm under paragraph 3, Rule 12, of the Rules of the Supreme Court. This brief is submitted, pursuant to paragraph 3 of Rule 7 (third sub-paragraph), in opposition to such motion.

The Nature of the Case.

The New Jersey tax commissioner in levying the transfer inheritance tax on the death of a New Jersey resident included in the property assessed a trust fund of over $375,000, owned and held in the State of New York by a

New York trust company as trustee under an irrevocable trust agreement executed by the decedent seven years before his death. By the terms of the deed of trust the income was payable to the grantor for life and thereafter to his wife, and upon the death of the survivor the trustee was directed to pay one-half of the principal to each of his two sons if then living, with other dispositions in case either or both of the sons should then have died. The trust deed was executed in New York, the securities constituting the subject matter of the trust were then in New York and had been there for five years previously, and they remained and were administered by the trustee in New York at all times thereafter. The trust deed provided in terms that it was to be construed according to the laws of New York. The grantor's sons, to whom the principal was payable in the contingency that they should survive both parents, were and are non-residents of New Jersey. The grantor's wife having predeceased him and both of the sons having survived him, the contingencies were fulfilled and the principal on the grantor's death became payable to the sons, individual appellants herein, in equal shares. The commissioner thereupon levied a tax, based upon one-half of the then value of the trust fund, against each of the sons as beneficiaries of transfers intended to take effect at the decedent's death.

In proceedings in the New Jersey courts to review the action of the tax commissioner, the appellants appropriately raised the objection that both the property and the transfers involved were beyond the jurisdiction of New Jersey, and that if the New Jersey tax statutes are applicable thereto, they violate the Fourteenth Amendment of the federal constitution. The New Jersey courts have overruled this contention and have construed the statutes as authorizing the challenged assessments, in particular the provisions for taxation of transfers in contemplation of death or intended to take effect at or after death; and the New Jersey courts have further held that the statutes as so construed are not unconstitutional.

Point I.

The only issues raised by the motion are whether the questions involved have already been settled by this Court adversely to the Appellants, and whether they are substantial.

Jurisdiction of this Court having been invoked by appeal, as a matter of right under the statute, U. S. Code, Title 28, Section 344, subd. (a); argument of the cause on its merits is believed to be out of place at this time, on a motion to dismiss or affirm. The present issue is whether it is a fact, as alleged by the appellee as the ground of the motion, that "every question on which the decision of the cause depends has been so explicitly foreclosed by the previous decisions of this court as to render further argument thereof unnecessary" and that a substantial federal question is wanting. (Appellee's brief, last page.) Those are the appropriate grounds for any such motion, but if they are not well taken, the motion should be denied.

Equitable Ass. Society v. *Brown*, 187 U. S. 308, 311; *Zucht* v. *King*, 260 U. S. 174, 176.

Point II.

The federal questions presented have not been settled by this Court adversely to the Appellants.

Appellants' contention on this appeal is that the due process clause of the Fourteenth Amendment does not permit the inclusion in the estate of a decedent, for the purpose of measuring a transfer inheritance tax, of property not located or owned within the state seeking to levy such tax at the time the transfer becomes effective. The pertinent basic principle is that taxation of the transfer of property beyond the territorial jurisdiction of the state is unconstitutional. (*Frick* v. *Pennsylvania*, 268 U. S. 473.) Conceding that intangible personal property in the form of securities actually located elsewhere may sometimes be deemed to be within the state of domicile of the owner, on the fiction of

mobilia personam sequuntur, appellants contend that there is no place for the operation of that fiction in the case of a transfer which does not become effective, so far as nonresident contingent beneficiaries are concerned, until after termination of all ownership and control in the state seeking to impose the tax.

The appellants' contention on this motion is that this question is settled adversely to the appellants by *Pearson* v. *McGraw*, 308 U. S. 313, and *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605.

The cases cited by the appellee are not directly in point and are distinguishable with respect to this main issue. They do not consider the question of the taxability of transfers of property outside of the taxing state, made outside of the state to nonresidents thereof, and which become effective only after title, ownership and power of disposition have passed from the domiciled decedent whose estate is the subject of taxation.

In *Pearson* v. *McGraw*, *supra*, the jurisdiction of Oregon to impose a tax upon a transfer which admittedly was made in contemplation of death, and to include the property transferred with the grantor's estate subject to inheritance taxation, in spite of the fact that it was actually located outside of the boundaries of the taxing state, was upheld by this Court on the ground that the grantor was domiciled in Oregon at the time of the transfer. In that case, however, the effective transfer not only of the legal title but also of the beneficial ownership to the chief beneficiaries subject to the burden of the tax—in particular the recipients of the life income—took place concurrently with the execution of the trust agreement, the grantor having reserved to himself no life interest in or right of disposition over the property transferred, and the transfer held taxable was either identical with or the contemporaneous consequence of the grantor's act. The doctrine of *mobilia personam sequuntur* was applied to bring within the taxing jurisdiction of the grantor's domicile immediate vested interests in property to which up to that time the grantor held legal title.

On the other hand, in the case now under consideration on this motion the individual appellants, upon whom the burden of any tax will rest, took neither an immediate interest nor any vested interest in the property transferred by decedent's deed of trust, for by the terms of the deed their rights were expressly conditioned on their survival of both parents. (State of Case, pp. 29, 30.) Until the death of the decedent their father, their mother having already died, these appellants' possibilities of succession were only contingent, or perhaps taxable at best as vested subject to divestment, and when they eventually did become indefeasibly entitled to share in the trust fund the latter was no longer owned by a domiciled resident of New Jersey, but by the New York trustee; in fact it had been so owned for seven years. Accordingly at the time of the transfer to the appellants—the only transfer under which they actually received either the property or certain title thereto—there was no room for the application of the doctrine of *mobilia personam sequuntur* as the basis for a New Jersey tax.

Furthermore, we read the record on appeal in the *Pearson* case as showing that the respective beneficiaries of the trusts there under consideration were taxable in accordance with the quality and value of such interests as they existed at the time of the execution of the trust deed, i.e. as present or future, as life interests or as remainders. This was in harmony with the theory of taxation of a present transfer from the Oregon domiciliary. In the present case the New Jersey tax commissioner made no pretense at assessing the transfers to these appellants at the value, at the time of the execution of the trust deed, of contingent remainders subject to the grantor's reserved life interest, but at the full value of the trust fund when the appellants took title on the grantor's death. (State of Case, pp. 36, 37.) This argument is made, not to challenge the amount of the tax, but to show that the transfer here attempted to be taxed by New Jersey was in fact the transfer that took place at the time of decedent's death, when the appellants for the first time

became definitely vested and succeeded to the trustee's title. But that was not a transfer from a New Jersey domiciliary, and New Jersey had then lost jurisdiction to tax.

The record in the present case further shows that the tax commissioner of New Jersey expressly levied the tax as one on transfers "to take effect at death", rather than as on transfers taking effect at the time of the execution of the trust deed. (State of Case, pp. 36, 37.)

It is the theory of the New Jersey inheritance tax statute that the tax is on the succession and receipt of the property rather than on the transmission thereof.

Turner v. *Cole*, 118 N. J. Eq. 497, 500;
Hartford v. *Martin*, 122 N. J. L. 283, 286;
Bowes v. *United States*, 127 N. J. Eq. 132, 141.

See also—

Knowlton v. *Moore*, 178 U. S. 41.

The case of *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605, the other case chiefly relied upon by the appellee, is also inconclusive of the present issues for reasons similar to those which distinguish *Pearson* v. *McGraw*. In the *Van Dyke* case this Court granted a motion to affirm upon the authority of the *Pearson* case, and no criticism can be made of that disposition. The *Van Dyke* case involved a gift tax, not an inheritance tax. The donees received their interests immediately upon the execution of the trust agreements, the donor having reserved no life income or other interest in himself except possible rights of reversion in case of the death of the beneficiaries without issue, in default of appointment, or in other remote contingencies. The subject of the tax was not a transfer effective upon the termination of these reserved contingent rights, but the immediate gift itself, as of the date thereof.

It should be remarked, moreover, that in the *Van Dyke* case not only the donor but also the trustee donees were residents of Wisconsin; and while it is not directly so stated

in the record of the case, it may be inferred that the same thing was true of all of the beneficiaries.

Another significant feature of both *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission* not present in the case now before the Court, is that the transfers involved were obviously parts of a plan to evade taxation. No such inference can be drawn from the present record, nor was it even suggested in the findings or opinions of any of the New Jersey courts. It was merely held that the trust deed was executed in contemplation of death, which may be a very different thing and quite innocent of improper connotations. In the Pearson case, however, a prominent element in the transaction was the purchase outside of the state of federal reserve notes with the purpose of a contention that they were tangible personal property and so not subject to the principle of *mobilia personam sequuntur* as applied in tax cases. (*Blodgett* v. *Silberman*, 277 U. S. 1.) In the *Van Dyke* case, with a similar purpose, the subject matter was converted into the inconvenient and significantly abnormal form of seven and one half tons of silver dollars.

Point III.

The questions presented are substantial.

The differences that have been pointed out between the case now before the Court, and the cases of *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission*, which the appellee has selected as bearing the closest resemblance to it, are substantial differences. It is unnecessary to state those differences again, but their importance is clearly indicated by the decision of this Court in *Binney* v. *Long*, 299 U. S. 280, as contrasted with its previous decision in *Coolidge* v. *Long*, 282 U. S. 582. Both of those cases dealt with the validity of inheritance taxes levied under statutes of Massachusetts upon the interests of persons succeeding to property upon the death of a life beneficiary under deeds of trust. The question in each case was whether such succes-

sion could be constitutionally taxed by legislation enacted subsequent to the creation of the trusts. The *Coolidge* decision denied the power to tax any interests, even of a future nature, that became vested immediately upon the execution of the trust deed; in the *Binney* case it was held that future interests were taxable on coming into possession if they had originally been merely contingent.

The appellee's brief seeks to distinguish the *Binney* case on the ground that the New Jersey tax statute was enacted before the execution of the Atkins deed of trust. That of course is true, but is beside the point, which is that taxability of the transfer depended on conditions as they existed at the time the beneficiaries' interests became vested. In the case of the present appellants, we contend that when they became definitively entitled to the property the latter had passed beyond the jurisdiction of New Jersey, even its domiciliary jurisdiction, and had obtained an exclusive New York situs.

Misapprehension of the grounds of this appeal should not arise from appellee's citation of *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383. We are not protesting against double taxation. Those cases thoroughly establish the constitutionality of New York's right to tax the transfer of the assets held in New York by the appellant Central Hanover Bank & Trust Company, even though the public policy of that state, as now expressed in its constitution, (N. Y. Const. Art. XVI, Sec. 3) may renounce the exercise of such right. But there is nothing in either of the cases cited any more than in *Pearson* v. *McGraw*, which establishes any right in New Jersey to impose a tax. In *Curry* v. *McCanless* the grantor had retained control over the property, through a reserved power of appointment, and her exercise of such control at the time of her death was held to constitute a taxable event. In *Graves* v. *Elliott* like control was retained and exercised at the time of death, such exercise of control in that case consisting in allowing a power of revocation to go unused. A similar power of dis-

position was the basis of taxation in *Graves* v. *Schmidlapp*, 315 U. S. 657. In the present case, however, the decedent Atkins had no power whatever over the property at the time of his death.

The substantiality of the distinction between vested and contingent interests as a ground for differentiation with respect to taxation was also recognized by this Court in *Salomon* v. *State Tax Commission*, 278 U. S. 484.

Point IV.

Both branches of this motion should be denied.

As indicated at the outset, we have not attempted in this brief to set forth in full appellants' argument in support of the appeal. The sole objective has been to show that the contentions of the appellee, so far as this motion is concerned, are not well grounded; that the questions presented are substantial and are not foreclosed by the prior decisions of this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

Docket No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors, etc. and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

—against—

WILLIAM D. KELLY, State Tax Commissioner of New Jersey,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

APPELLANTS' BRIEF.

ROBERT McC. MARSH,
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CLAUDE A. HOPE,
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THE COURT PRESS, N. Y. C.

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Appellants,

—against—

WILLIAM D. KELLY, State Tax Commissioner of New Jersey,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

APPELLANTS' BRIEF.

Opinions of the State Courts.

The opinion of the Prerogative Court (R. 28-52) is officially reported in 129 N. J. Eq. 186. The opinion of the Supreme Court of New Jersey (R. 62) is officially reported in 127 N. J. L. 468. The opinion of the Court of Errors and Appeals (R. 66) is officially reported in 129 N. J. L. 127.

Of these opinions, the only one which states the facts and discusses the questions of law is that of Vice-Ordinary Buchanan in the Prerogative Court. The Supreme Court merely approved and in effect

adopted the opinion of the Prerogative Court. The Court of Errors and Appeals affirmed, "generally for the reasons expressed in the opinion delivered by the late Vice-Ordinary Buchanan", with the addition of a few observations directed toward a part of the case which is not under review on this appeal.

Grounds of Jurisdiction.

A statement as to the jurisdiction of this Court has already been filed in compliance with paragraph 1 of Rule XII, and probable jurisdiction was noted by this Court on February 15, 1943 (R. 80).

The appeal is taken under Judicial Code, Section 237(a), as amended by the Acts of January 31, 1928, and April 26, 1928, from a final judgment of the Court of Errors and Appeals of New Jersey upholding the validity of a statute of said state, which was drawn in question on the ground of its being repugnant to the Constitution of the United States.

Statement of the Case.

The proceeding was commenced by the appellants in the Prerogative Court of New Jersey by petition of appeal to review the action of the State Tax Commissioner in levying a transfer inheritance tax payable on the death of George W. E. Atkins, a New Jersey resident, who died in 1936 (R. 24). The appellants are the executors under the will of said decedent, and the individual appellants are also beneficiaries both under said will and under an irrevocable trust agreement executed by the decedent in 1929, seven years before his death. A copy of the trust agreement was annexed to the petition of appeal (R.

18-23). The Tax Commissioner included the trust fund held under said agreement as part of the property to be assessed as subject to tax, and levied a tax upon the appellants measured, in part, by their interest in such trust fund (R. 24-25).

The trust agreement was executed by the decedent in the City and State of New York, with Central Hanover Bank and Trust Company, a corporation of that state, as trustee (R. 27). Securities having a par value of more than $389,000 were simultaneously transferred to the said company to hold in accordance with the terms of the trust (R. 24). Those securities were already in New York, having been held by the trust company in a safekeeping account for the grantor, and most, if not all, of them had been so held for five years previously (R. 26); and the assets constituting the trust fund from time to time always remained in New York, and all acts of the trustee in administration of the trust were performed there (R. 27). At all times the assets consisted entirely (with negligible exceptions) of investments such as bonds, stocks, mortgages and cash (R. 26-27). The indenture contained a clause providing that it should be construed "according to the laws of the State of New York where it is made and where it is to be enforced" (R. 22). No power was reserved to the grantor, either of revocation, of amendment, or of appointment, or of any control over the administration of the trust.

By the terms of the trust indenture, the income from the trust fund was payable to the grantor for life, and thereafter to his wife; and upon the death of the survivor, the trustee was directed to pay one-half of the principal to each of his two sons if then living, with other dispositions in case either or both

of the sons should then have died (R. 20). The grantor's wife predeceased him and both of the sons survived him. The contingencies upon which the principal of the trust fund might become payable to them being thus fulfilled upon the death of the grantor, the sons thereupon became entitled to receive such principal in equal shares. These sons, the individual appellants, were then and still are nonresidents of New Jersey; George Chew Atkins residing at Bronte, Ontario, and John Norton Atkins residing at the time of the decedent's death at Sewanee, Tennessee (R. 13), but having since moved to Richmond, Virginia.

The additional amount of tax imposed upon the appellant, George Chew Atkins, by reason of the inclusion of this trust fund in the property assessed for transfer inheritance tax, is $8,133.59 and that imposed upon John Norton Atkins is $8,227.99, the difference being due to a variation of rates caused by unequal interests in the property passing under decedent's will (R. 24-25).

The Prerogative Court upheld the Tax Commissioner's determination, and the appellants prosecuted a writ of certiorari in the Supreme Court, where the tax was again affirmed. The judgment of the Supreme Court was again affirmed, upon appeal, by the Court of Errors and Appeals. In all of these courts, the appellants by appropriate procedure presented the contention that the New Jersey statutes, if construed as authorizing the levy of a tax based upon a transfer of interests in this trust fund to the appellants, violate the Fourteenth Amendment of the Constitution of the United States by depriving the appellants of their property without due process of law (R. 6-8, 58-61, 65).

In the New Jersey courts, the appellants also challenged the taxation of certain annuity insurance policies, but the decision on that point presents no federal question and is not involved in the present appeal.

The decedent was a resident of New Jersey both at the time of his death and at the time of the execution of the trust agreement. The Prerogative Court found as a fact that the trust agreement was executed in contemplation of death and intended to take effect in possession or enjoyment at or after death (R. 54). That finding is not questioned on this appeal.

The Question Presented.

The main question presented by this appeal is briefly this: Has the State of New Jersey constitutional power to assess and levy a transfer inheritance tax upon the transfer, pursuant to a trust indenture, of a trust fund held and administered entirely in the State of New York by a corporate trustee, incorporated under the laws of New York and doing business therein, to nonresidents of New Jersey whose rights, if any, in such trust fund had been theretofore only contingent, merely because the creator of the trust, who was also the life beneficiary thereunder, was at the time of its creation and at the time of his death a resident of New Jersey?

The New Jersey Statutes.

The courts of New Jersey, including the Court of Errors and Appeals in the judgment appealed from, have held that the State of New Jersey has this power of taxation by virtue of Sections 1 and 18 of

Chapter 228 of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935, and Section 12 of Chapter 303 of the Laws of 1931.

Said Section 1, as so amended, reads as follows:

"1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred ($500.) dollars, or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:

First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

Second. When the transfer is by will or intestate laws of real property within this State or of goods, wares and merchandise within this State, and the decedent was nonresident of the State at the time of his death.

Third. When the transfer is of property made by a resident, or is of real property within this State, or of goods, wares and merchandise within this State, made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *

Fourth. When any person or corporation comes into the possession or enjoyment, by a transfer from a resident or from a nonresident decedent, when such nonresident decedent's property consists of real property within this State or

of goods, wares and merchandise within this State, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by an instrument taking effect after the passage of this act, or of any property transferred pursuant to a power of appointment contained in any instrument taking effect after the passage of this act." (P. L. 1935, pp. 264-5.)

(N. B. The remainder of the section is believed immaterial to the present issue.)

Said Section 18, as so amended, reads as follows:

"18. In order to fix the value of property of persons whose estates shall be liable to the payment of a tax under this act, whether the same be in the ownership of a resident or nonresident decedent, the State Tax Commissioner on the application of any interested party, or upon his own motion, shall appoint some competent person as appraiser as often as and whenever occasion may require. Every such appraiser shall forthwith give notice, by mail, to such persons as the State Tax Commissioner shall direct, of the time and place when and where he will appraise such property. He shall at such time and place appraise the same at its fair market value, and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses, and to take the evidence of such witnesses under oath concerning such property and the value thereof, and he shall make report thereof, and of such value, in writing to said State Tax Commissioner, together with such other facts in relation thereto as the said State Tax Commissioner may, by order, require, which report and other data required by said Commis-

sioner shall be filed in the office of such Commissioner, and from said report the said State Tax Commissioner shall forthwith assess and fix the cash value of such estate and levy the tax to which the same is liable, and shall immediately give notice thereof, by mail, to all parties known by said State Tax Commissioner to be interested therein. Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interests and costs, if the said tax be affirmed by the Ordinary. * * *." (P. L. 1931, pp. 763-4.)

The foregoing sections were in effect at the time the tax involved in the pending cause was levied. They are now incorporated in the Revised Statutes of New Jersey, 1937, as 54:34-1 and 54:34-6 to 13.

Specification of Errors to be Urged.

The appellants intend to urge errors 1 and 3 as set forth in their assignment of errors (R. 74, 75). These two errors relate to the same fundamental question, merely presenting the point separately as it affects each of the individual appellants. Error 1 is directed to the action of the Tax Commissioner with respect to the property transferred to George Chew Atkins and error 3 is directed to such action with respect to the property transferred to John Norton Atkins.

The point raised by both errors is that the New Jersey statute, as construed by the judgment ap-

pealed from, authorizes the taxation of transfers of property not within the jurisdiction of the state at the time of the transfer, and is therefore unconstitutional as depriving appellants of property without due process of law.

The form and manner in which this point was presented to the New Jersey courts and the action of those courts respectively thereon are fully set forth in the appellants' statement as to jurisdiction heretofore filed.

Substitution of Respondent.

The term of office of J. H. Thayer Martin as State Tax Commissioner having expired, William D. Kelly, his successor, was substituted as party respondent herein by order of the Court of Errors and Appeals (R. 68).

Summary of Argument.

Point I. The jurisdiction to tax any transfer of this property can rest only on the domicile of the decedent Atkins and his relationship to the property at the time of the transfer.

Point II. There was no taxable transfer from the decedent to these appellants at the time of the execution of the trust indenture.

Point III. The domicile of the decedent at the time of his death affords no basis for taxation of transfers made at that time.

POINT I.

The jurisdiction to tax any transfer of this property can rest only on the domicile of the decedent Atkins and his relationship to the property at the time of the transfer.

It is a fundamental and often declared principle of constitutional law that the subject matter of a state's power to tax is limited to persons and property within its governmental jurisdiction and that any attempt to tax beyond that jurisdiction partakes rather of the nature of an extortion than a tax, and is the taking of property without due process of law.

While the boundaries of such governmental jurisdiction have been the subject of many disputes, the principle itself is believed to have universal acceptance. Even before the adoption of the Fourteenth Amendment, Chief Justice Marshall had said, with reference to the taxing power:

> "But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."
>
> *McCulloch* v. *Maryland*, 4 Wheat. 316, at p. 429.

Thereafter, the Court spoke again through Harlan, *J.*:

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government."
>
> *Louisville etc. Ferry Co.* v. *Kentucky*, 188 U. S. 385, at p. 396.

It is unnecessary to multiply citations of cases in which the basic nature of the principle has been recognized. It has been applied not only to the direct taxation of property, but to the taxation of transfers of property, privileges and various other forms of excises and indirect taxation. The inability of a state to levy a property tax on land outside of its territorial boundaries has been stated from time to time by this Court, although scarcely the subject of controversy.

> *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, at p. 204;
> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, at p. 208.

The principle extends to tangible personal property.

> *Union Refrigerator Transit Co.* v. *Kentucky*, *supra*;
> *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341.

The taxation of intangible personal property, such as stocks, bonds, bank accounts, credits and the like owned by a resident of the taxing state, but the documentary evidences of which are located in another state, has not been considered an exception to this principle, such intangibles being deemed to be physically located within the taxing state through the operation of the maxim *mobilia sequuntur personam*.

> *Union Refrigerator Transit Co. v. Kentucky*, *supra*, at p. 205.

But the operation of that maxim is not effective to give a state power to levy a direct property tax thereon where the resident of the taxing state has only an equitable interest therein, and the legal title is held elsewhere.

> *Brooke v. Norfolk*, 277 U. S. 27;
> *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83.

The same limitations which forbid the direct taxation of property outside of the state forbid the taxation of transfers of such property.

> *Frick v. Pennsylvania*, 268 U. S. 473;
> *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69.

It was said by Taft, *C. J.* in the latter case:

> "The tax here is not upon property, but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a transfer tax as in that of a prop-

> erty tax. A state has no power to tax the devolution of the property of a nonresident unless it has jurisdiction of the property devolved or transferred." (270 U. S. 69, at p. 80.)

While the quoted opinion continues by stating that in the case of intangibles a transfer tax may be levied by the state in which the owner resides, there is nothing in the context which would justify the extension of this exception, either to mere equitable ownership, or to no ownership whatever at the time of the transfer.

There is no single factor, the presence of which is always essential to give a state jurisdiction to tax either property or transfers of property. The constitutional power may, under a variety of circumstances, be based not only on the actual location of the property within the state's boundaries, or fictitious location at the domicile of the owner therein, but likewise on the established and fixed presence therein of intangibles belonging to a nonresident which have acquired a fixed or business situs within the state, or are there held in trust for nonresidents.

> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193;
> *Liverpool, etc. Ins. Co.* v. *Board of Assessors*, 221 U. S. 346;
> *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234;
> *Curry* v. *McCanless*, 307 U. S. 357.

Again, jurisdiction may sometimes be rested on the fact that the taxing state has through its own laws extended to the property some protection or benefit, for which it can ask return.

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435;
State Tax Commission v. *Aldrich*, 316 U. S. 174;
Blackstone v. *Miller*, 188 U. S. 189.

Sometimes domicile alone may be a sufficient basis for taxation, particularly in the cases of income taxation or inheritance taxation on the transfer of personal property owned by resident decedents at the time of death.

New York ex rel. Cohn v. *Graves*, 300 U. S. 308;
Lawrence v. *State Tax Commission*, 286 U. S. 276;
Blodgett v. *Silberman*, 277 U. S. 1.

Just as it cannot be said that the presence of any one of the above described factors is essential to the jurisdiction to tax, neither has it been said by this Court that such jurisdiction will be found to exist in every case provided any one of them is present, irrespective of the other facts and circumstances. Moreover, as one of these elements of jurisdiction may exist in one state while another of them is coexistent in a different state, both of such states may claim the right to tax the same property or transfer simultaneously. However undesirable double taxation may be from an idealistic point of view, it must be admitted that such taxation is not necessarily unconstitutional and the rights of the two states need not be mutually exclusive.

Curry v. *McCanless*, *supra*;
State Tax Commission v. *Aldrich*, *supra*.

In so far as the taxing power of the state is based upon the domicile of the owner of the property, it is analogous to the state's domiciliary control over other activities of its citizens.

> *Milliken* v. *Meyer*, 311 U. S. 457, at p. 463;
> *Skiriotes* v. *Florida*, 313 U. S. 69.

The domiciliary jurisdiction of a state to tax the transfer of property located outside of the state for the purpose of levying an inheritance transfer tax thereon has been extended to include the case of property not actually owned by the decedent at the time of his death, but over which he had some power of disposition, such as a power of appointment or a power of revocation of a previous gift, or otherwise.

> *Curry* v. *McCanless*, *supra*;
> *Graves* v. *Elliott*, 307 U. S. 383;
> *Graves* v. *Schmidlapp*, 315 U. S. 657;
> *Keeney* v. *New York*, 222 U. S. 525.

Beyond this point, however, this Court has not yet gone, and we submit that any statute purporting to tax a transfer of property owned and located outside of the state, simply because the transfer takes place upon the death of a resident of the state where such resident at the time of such transfer neither owned any transferable interest in the property nor had any power over it, is taxation without jurisdiction and a deprivation of property without due process of law. That is precisely the effect, as we shall proceed to show, of the New Jersey statute as interpreted by the courts of New Jersey in the case under review.

Of the three elements which have been described as affording a possible basis for jurisdiction to tax,

the one chiefly relied upon in the opinions of the New Jersey courts is that of the domicile of the decedent. It is said in the opinion of the Vice-Ordinary: "That property was admittedly intangible personalty; and the power to tax such property inheres in the state of the domicile and the owner thereof" (R. 36, ll. 8-10); and again: "The tax is *imposed on the transfers made by the present* deed of trust, because that deed was made by a resident of New Jersey" (R. 36, ll. 30-32); and again: "But, whatever the theory, it is certainly firmly established that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner a tax on the use and enjoyment of rights and intangibles measured by their value" (R. 43, ll. 31-35). The same reliance on domicile of the decedent appears repeatedly throughout the opinion of the Vice-Ordinary (R. 46, ll. 20, 35; R. 48, ll. 7, 12, 34; R. 51, l. 34).

It would be obviously hopeless for the appellee to contend that New Jersey would have any jurisdiction to tax a transfer of this property because of the actual location of the property, and equally hopeless for it to contend that there was even a fictitious location within the state because of the maxim *mobilia sequuntur personam*, except in so far as that maxim might acquire applicability from the fact of decedent's domicile in New Jersey. The securities which constituted the trust fund were actually located and held in New York from the time of the execution of the trust deed, and most of them had been there for at least five years prior to that time (R. 26). It does not appear that any of them had ever been in New Jersey. From the time of the execution of the trust agreement the title to these securities was in the

New York trustee and, if the above mentioned maxim has any value, their fictitious situs based on the domicile of the owner was in New York, as well as their actual situs.

Safe Deposit and Trust Company v. *Virginia*, 280 U. S. 83.

Nor can the State of New Jersey claim any taxing power for the transfer thereof at the time of decedent's death because of any privilege, protection or benefit conferred by the laws of New Jersey. The trustee, which was at least the owner of the legal title, was a New York corporation carrying on business there and administered the trust entirely in that state (R. 27). It did not have to seek the assistance of the New Jersey law to turn over and deliver the trust fund to these appellants when they became entitled thereto on the decedent's death. It did not have to account to any New Jersey court for its acts as trustee. New Jersey extended no protection to the property, either while in the hands of the trustee or while in the previous safekeeping account, nor did either the trustee or the trust property receive any other benefit from New Jersey or the laws thereof which could give rise even to a moral obligation to make any return in the form of a tax payment. The trustee was not even indebted to New Jersey for the privilege of receiving the fund at the time of the original transfer in 1929, for the transfer was made in the City and State of New York (R. 23). The trustee's powers to receive the fund were derived solely from the laws of the State of New York, under which it is incorporated, and the act of transfer had legal validity by virtue of those laws, rather than the laws of New

Jersey, both because the act took place in New York and because the trust agreement expressly provided that it should be construed "according to the laws of the State of New York, where it is made and where it is to be enforced" (R. 22). This provision for construction according to the law of New York undoubtedly applies not only to particular phrases and clauses in the agreement, but to the instrument itself as an effective act of transfer. While no question has arisen, so far as we are aware, relating to the construction of this instrument, or any suggestion that its meaning and effect are in any way different from what they would have been had it been governed by the laws of New Jersey, the point is mentioned merely to rebut any claim that the laws of New Jersey in some way contributed to the transfer that was made in 1929.

Not only did the trustee owe nothing to the laws of New Jersey when it took the trust fund in 1929, but the grantor, in making that transfer, exercised no privilege derived from the laws of the state in which he was domiciled. Had the trust deed been executed and the securities transferred in New Jersey, perhaps it could then have been said that in executing the deed and delivering the securities he exercised either a privilege or a right granted to him by the laws of the state to which he owed allegiance; but when he performed these acts in New York he performed them, not by virtue of the powers which he derived from the State of New Jersey, but by virtue of the rights and privileges granted by New York to its own citizens and which the grantor, as a citizen of another state, was entitled to enjoy by virtue of

Article IV, Section 2, of the Constitution of the United States.

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

U. S. Constitution, Article IV, Section 2;
Ward v. *Maryland*, 12 Wall. 418;
Paul v. *Virginia*, 8 Wall. 168.

Accordingly, no foundation for any jurisdiction of the State of New Jersey to tax the transfer of the Atkins trust fund can be discovered in any legal right or economic benefit contributed by New Jersey. Nor do we understand that any such contention has been put forward either by the appellee or by the New Jersey courts, except in so far as such contention may be involved in arguments based on the decedent's domicile. The case bears no resemblance in this respect to *State Tax Commission* v. *Aldrich*, 316 U. S. 174, and *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435.

It follows that the only theory for sustaining the tax statute under review, which requires further consideration, is the theory of domiciliary jurisdiction based either on Atkins' residence at the time of the execution of the trust agreement or at the time of his death. The two branches of this theory will now be considered separately.

POINT II.

There was no taxable transfer from the decedent to these appellants at the time of the execution of the trust indenture.

The opinion of the Prerogative Court reveals some uncertainty of view as to what particular transfer is held subject to the tax and as to when such transfer took place. Some portions of the opinion indicate a theory that a transfer to the future beneficiaries took place immediately upon the execution of the trust deed and that the transfer which then took place was that of an equitable remainder. Other portions of the opinion indicate that the transfer to the appellants took place at the death of the decedent, who was both grantor and life beneficiary. In still other portions of the opinion the suggestion is advanced that the taxable transfer took place in two stages, being commenced by the execution of the trust deed and completed on the decedent's death. The first of these three theories will be considered in the present subdivision, the other two being treated hereafter.

The theory that the transfer on which the tax is levied was one made by the grantor in the trust agreement at the time of its execution is expressed in the opinion as follows:

> "The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title of the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, *and also a transfer, at the same time*, of an equitable interest of contingent remainder therein, to the two sons." (R. 46, ll. 18-23; emphasis supplied.)

And again—

> "* * * It necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him *at the time he executed and delivered the deed.*" (R. 47, ll. 40-43; emphasis supplied.)

The selection of the execution of the deed as the taxable event is even more definitely indicated by the Court's suggestion that the continuance of the grantor's domicile in New Jersey until his death was an immaterial fact (R. 48).

The Commissioner Has Not Taxed the 1929 Transfer.

In appraising this theory of the taxable transfer it is appropriate to point out that the tax which has actually been levied upon the decedent's sons is not in fact one that is based upon an equitable future interest in property transferred to them in 1929, when the trust deed was executed, but upon property which they became entitled to receive from the trustee on the death of the life beneficiary in 1936. This appears very clearly from a comparison of the summary of Schedule A annexed to the trust agreement with the inheritance tax return and with the Commissioner's analysis of the tax. The actual value of the property transferred in 1929 is nowhere computed or appraised, the par value alone being stated in Schedule A of the agreement as amounting to $389,000, plus one item in francs (R. 24). The property described in the tax return, however, and the values set forth therein, upon which the appraiser acted, were listed as they existed at the time of the death (R. 12), at which time the net value of the trust fund was $377,962.04. It will be noted that this sum is almost

precisely equal to twice the figure of $188,458.52 shown on the tax return as the value of one-half of the trust fund apportioned to each of the sons in the Commissioner's computation of the tax (R. 24-25). (The reason for this slight difference does not appear in the record, but we believe the appellee will not deny that it was due merely to the rejection of the valuation of one item listed in the tax return.)

This actual appraisal of property transferred and assessment of a tax on the transfer thereof, based upon the contents of the trust fund and their values at the time of decedent's death, is not only inconsistent with the Court's declarations that the taxable transfer took place on the execution of the trust deed, but it is also in conflict with the provisions of the statute which would have been applicable had the transfer taken place at that time. This statute, which is part of Section 3 of the Transfer Inheritance Tax Law of New Jersey, reads as follows:

> "*Executory devises or contingent or defeasible estates in expectancy.* When an instrument creates an executory devise, or an estate in expectancy of any kind or character which is contingent or defeasible, the property which is the subject of such devise or in which such contingent or defeasible interest is created shall be appraised immediately at its clear market value. The life estate or estate for a term of years shall be valued in accordance with section 54:36-2 of this title, and if taxable, the tax shall be assessed and levied thereon immediately and shall be immediately due and payable. Thereupon, the value of the estate for life or term of years shall be deducted from the appraised value of the property which is the subject of such devise or

limitation and the tax on such balance of the estate shall not be levied or assessed until the person or corporation entitled thereto comes into the beneficial enjoyment, seizin or possession thereof, at which time, if taxable under the provisions of chapters 33 to 36 of this title (§54:33-1 *et seq.*), it shall be taxed."

Laws of 1909, Chapter 228, Section 3 as amended by *Laws of 1918*, Chapter 283, Section 2, and *Laws of 1931*, Chapter 303, Section 2; *Revised Statutes of N. J. 1937*, 54:36-3.

If there were any validity in the theory that the taxable transfer to the appellants took place when the deed of trust was executed, the property transferred to the trustee should have been appraised at its then value and the interest of the appellants therein calculated by deducting from such appraisal the value of the life trust. But it is the established New Jersey law that in the case of a gift in contemplation of death, or to take effect at death, the transfer tax is to be levied as at the death of the grantor.

"The tax is a transfer tax at death."

Wimpfheimer v. *Martin*, 126 N. J. L. 502.

And to the same effect:

City Bank Farmers Trust Company v. *Martin*, 126 N. J. L. 506;
Nicholas v. *Martin*, 127 N. J. L. 35.

Moreover, it has been, heretofore at least, the accepted theory of the New Jersey statute that the tax is levied on the privilege of receiving the property.

"The statute levies an excise on the right or

privilege of succeeding—as distinguished from the right of transmission—to the possession or enjoyment of property or an interest therein. (*Turner* v. *Cole*, 118 N. J. Eq. 497.) The privilege of succession—the 'shifting of the economic benefits and burdens of property'—is the thing taxable under the statute."

Hartford v. *Martin*, 122 N. J. L. 283, at p. 286.

There is nothing in the language of the Court of Errors and Appeals in the present case to indicate any intention of modifying the established doctrine.

The purpose of citing these decisions and this section of the New Jersey statute is not to contend that the method of assessment in the present case was improper, or that the statute has been erroneously construed, but to emphasize the confusion inherent in these portions of the Prerogative Court's opinion which maintain that the transfer to these individual appellants took place at the execution of the trust deed. We do not of course assert that there was no transfer of any kind at that time, the title to the securities having been undoubtedly transferred entirely out of the ownership of the New Jersey domiciled grantor into the ownership of the New York domiciled trustee. We do contend, however, that there was no taxable transfer at that time to these appellants.

The Appellants' Future Ownership Was Speculative.

In 1929 the relationship of these appellants to the future ownership of the trust fund was entirely speculative and contingent. By the terms of the trust

deed they would take nothing unless they survived both parents. If they did survive, they would take immediately upon the death of the life beneficiary; if they did not survive, the property would go elsewhere. The following is the language of the deed of trust with respect to the dispositions to be made upon the death of the grantor in case his wife should predecease him, as she did (R. 20):

> "(b) In case the Grantor's wife shall not survive the Grantor, the Trustee shall, upon the Grantor's death, divide the trust estate into equal shares, to be disposed of as follows:
>
> In case George shall survive the Grantor, the Trustee shall transfer, assign and pay over to George one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor). In case George shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita*, one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor).
>
> In case John shall survive the Grantor, the Trustee shall transfer, assign and pay over to John one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor). In case John shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita*, one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor);

(e) In case neither the Grantor's wife, nor George nor issue of George, nor John nor issue of John, shall survive the Grantor, the Trustee shall transfer, assign and pay over the entire trust estate to the Grantor's brother, John W. Atkins, if then living, or if not living, then to the other heirs at law and next of kin of the Grantor."

This Court has warned against importation into tax cases, especially those involving estate taxes where there have been *inter vivos* trusts, argument based on the "niceties of the art of conveyancing, or the law of contingent or vested remainders".

Klein v. *U. S.*, 283 U. S. 231, 234.

We have also recently been reminded that the "law of contingent and vested remainders is full of casuistries".

Helvering v. *Hallock*, 309 U. S. 106, 117.

Accordingly we shall not attempt to follow the New Jersey court and seek a definite answer to the problem of describing in legalistic terms the prospects of the grantor's sons with respect to the future enjoyment of this property. Indeed, no such precise classification or definition is believed to be necessary. It is indisputable, however, that any rights which these sons may be said to have had during the continuance of the life trust were clearly defeasible. Enjoyment was subject in each case to a condition precedent, namely, survivorship. There was ground for reasonable expectation no doubt, in view of common experience that sons usually outlive their fathers, but there was nothing definite or certain about it.

There was nothing which could be called a definite right in property. Their situation is not strengthened by characterizing it as ownership of a contingent remainder, or even of a remainder vested subject to being divested. Where the future ownership of property remains in suspense and there is uncertainty as to its ultimate enjoyment, the law has for convenience usually denominated such future interest as a contingent remainder, but where the uncertainty is not only as to the time of enjoyment but as to the identity of the person to whom the enjoyment will come, such remainder is not so much a property right as a possibility and a hope. Until this hope develops into a vested interest, we submit that there is no property which has been the subject of a transfer.

If the term "remainder" is to be used at all in connection with the prospective relationship of the sons to the property during their father's lifetime, and it is deemed necessary to distinguish between a defeasible remainder that is called contingent and one that is called vested subject to being divested, we believe that it would be more technically correct in the present instance to use the former term than the latter, equally under the general law, the law of New Jersey and the New York statutes. Particularly is this true in New York because of the express direction to divide and pay over.

Klein v. *United States*, 283 U. S. 231;
Gifford v. *Thorn*, 9 N. J. Eq. 702;
Teets v. *Weise*, 47 N. J. L. 154;
Delafield v. *Shipman*, 103 N. Y. 463;
Matter of Crane, 164 N. Y. 71;
Wright v. *Wright*, 225 N. Y. 329.

The importance of the distinction between defeasible and indefeasible future interests from the point of

view of the constitutionality of taxation was recognized by this Court in *Binney* v. *Long*, 299 U. S. 280, in which was involved the validity of an inheritance tax levied under the Massachusetts statutes upon the interests of persons succeeding to property upon the death of a life beneficiary under a deed of trust. The tax was sustained because the succession interests had been merely contingent at the time of the enactment of the legislation, and the case was distinguished from the previous decision in *Coolidge* v. *Long*, 282 U. S. 582, dealing with the same statute, where the remainders attempted to be taxed were already vested in interest when the law was passed. Thus the court in effect held that the so-called owner of a contingent future interest has nothing which is entitled to protection against taxation by subsequent legislation.

In the opinion of the Prerogative Court it is argued that there was a definite property right transferred to the appellants by the execution of the deed of trust, even though the entire legal title passed to the trustee, namely, something called an equitable remainder. We have shown that, no matter what may have passed at that time from the grantor, nothing then passed to the individual appellants, his sons, or to any other person except the trustee, because the identity of the future owners of the property remained to be disclosed by the development of events. Under these circumstances there could not have been any equitable remainder in existence separate and apart from the legal title if the term implies a right in the property itself. It is difficult to see how there can be a right in property without an owner; and even the conception of some different form of right, such as a right *in personam* or a chose in action, con-

notes the existence of some one to whom the right belongs. But until the death of the life beneficiary the relationship of these appellants and of all others who might possibly succeed to the property remained *in futuro*.

> "It must be an object of no small curiosity to understand how a remainder can pass from a donor until there exists some donee to receive it of him; if it passes at all, the conclusion rather seems to be, it passes to somebody; and whilst it does not pass to anybody, one might suppose it does not pass at all."
>
> *Fearne on Contingent Remainders*, p. 361.

In the passage quoted the author was criticizing the common law view, expressed by Blackstone, that pending the termination of a legal life estate, the remainder being contingent, the ownership of the fee was in abeyance (2 Bl. Comm. 107). He was not discussing the situation resulting from the transfer of the entire legal title to a trustee, a situation in which the necessity of implying the retention of an interest in the grantor would not arise. Elsewhere Blackstone pointed out that the conveyance of legal title to a trustee was a method of preventing the owner of the life estate from destroying the contingent remainders (2 Bl. Comm. 171). Both writers agree therefore that nothing of substance passed to contingent remaindermen at the time of the execution of the deed.

Pending the Contingency the Entire Ownership Was in the Trustee.

If a contingent legal remainder is not property which can pass to remaindermen until the resolution of the contingency, a so-called contingent equitable remainder is still less a subject of transfer. There has been much discussion concerning the nature of equitable interests under trusts and particularly whether they are to be classified as rights *in rem* or as rights *in personam* against the trustee.

1 Scott on Trusts, Section 130;
17 Columbia Law Rev. 467.

Also, authorities have differed as to whether in the creation of a trust, with a life interest and with dispositions to take effect after the termination of the life interest, the future beneficiaries take any legal title in remainder even when the remainders are vested, or whether the entire legal title is in the trustee. A distinction in this respect is drawn by the American Law Institute between real and personal property, an interest of unlimited duration being attributed to the trustee in the latter case but not in the former, unless a different intention is manifested.

Restatement, Trusts, Vol. I, §88.

See also:

1 Scott on Trusts, p. 487.

No such distinction exists under the law of New York, by the laws of which state the Atkins trust deed is according to its express provisions to be

interpreted, and by such law it is clear that the trustee of an express trust takes the entire legal estate "subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust".

New York Real Property Law, Section 100; *N. Y. Personal Property Law*, Section 11; last sentence.

While it is further provided that the section just quoted shall not prevent the creator of a trust "from declaring to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust", and that "such a grantee or devisee shall have a legal estate in the property against all persons except the trustees and those lawfully claiming under them" (Real Property Law, Section 101), this qualification is inapplicable to the Atkins trust deed for the reason that the grantor refrained from declaring at the time of the execution of the deed to whom the property should belong upon the termination of the trust, but left the determination of the future ownership dependent upon the outcome of events. For seven years after the execution of the deed there was no one who could claim to be the grantee of any future interest either legal or equitable.

Whatever the rule may be regarding the rights of future beneficiaries of indefeasibly vested remainders created by deeds of trust, it has been clearly held in New York that where succession to the future interests is contingent with respect to the individuals who

will eventually become entitled, the prospective remaindermen are not necessary parties to a foreclosure of a mortgage on the trust property, because the trustee in such a case is vested with the entire title, both legal and equitable.

United States Trust Co. v. Roche, 116 N. Y. 120;

Townshend v. Frommer, 125 N. Y. 446.

Unborn contingent remaindermen need not be represented in an action to nullify the trust.

Bloke v. Mattera, 186 App. Div. 488.

Even if in existence, contingent remaindermen are barred by the same claims of adverse possession which defeat the trustee, for the reason that the entire title is in the latter, both legal and equitable.

Bennett v. Garlock, 79 N. Y. 302.

In each of the foregoing New York cases the subject matter of the trust was real property. The same principle is applied in trust funds of personalty, it being said in one case:

> "In trusts of this character, we think it must be considered that the whole title to the trust fund is in the trustee, and that all the remaindermen have is the right to an account."

Rhodes v. Caswell, 41 App. Div. 229, 234.

The unsoundness of the argument that a transfer to a contingent remainderman takes place at the creation of the trust rather than at the end of the life interest, or at least the determination of the con-

tingency, is demonstrated by the situation presented where the contingent remaindermen are not in being when the trust is created. If a trust is created by A for the benefit of his daughter B for life, the principal upon her death to be divided among her children then surviving, B having no children at the time of the execution of the trust agreement, how can it be said that there is any transfer to them at that time?

Cases Relied on by the Appellee.

The New Jersey Tax Commissioner in support of his motion to dismiss this appeal relied strongly on *Pearson* v. *McGraw*, 308 U. S. 313. In that case the main question argued was whether federal reserve notes held by an Illinois trust company under a trust created by the decedent, domiciled in Oregon, were subject to an Oregon transfer inheritance tax on the death of the creator of the trust. The trust was irrevocable, without any reserved power of disposition or control. The creation of the trust and the transfer to the trustee had admittedly been made in contemplation of death, and was therefore subject to an inheritance tax under the Oregon statute unless exempt for constitutional reasons. It was argued that the federal reserve notes should be considered as tangible property and therefore beyond the taxing jurisdiction of Oregon, but the majority of the court held it was unnecessary to consider this question because the purchase of the notes had been accomplished through sale of other property with respect to which it did not arise, both transactions being part of a single plan to evade taxation. No question was involved concerning the time as of which the property should be appraised or as to the identity of the trans-

fer which was to be made the subject of the tax, because the tax had not in fact been assessed. It appears in the printed record, moreover, that no life interest was reserved to the grantor, but the main beneficiaries under the deed of trust acquired their interest immediately upon the execution of the trust deed, and the determination of the future beneficiaries was in no way contingent upon the death of the grantor.

Furthermore, we read the record on appeal in the *Pearson* case as showing that the respective beneficiaries of the trusts there under consideration were taxable in accordance with the quality and value of such interests as they existed at the time of the execution of the trust deed, *i. e.*, as present or future, as life interests or as remainders. This was in harmony with the theory of taxation of a present transfer from the Oregon domiciliary and in contrast with valuation procedure adopted by the Tax Commission of New Jersey in the present instance.

Another case relied upon by the appellee in his motion to dismiss or affirm is *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605, in which a motion to affirm had been granted by this court upon the authority of *Pearson* v. *McGraw*. In the *Van Dyke* case, however, the tax involved was a gift tax, not an inheritance tax. It appears from the record that the donees received their interests immediately upon the execution of the trust agreements, the donor having reserved no life income or other interest in himself except possible rights of reversion in case of the death of the beneficiaries without issue, in default of appointment, or in other remote contingencies. The subject of the tax was not a transfer effective upon

the termination of a life interest or of any other future connection of the grantor with the subject of the tax, but was the immediate gift itself, as of the date thereof. It should be remarked, moreover, that not only the donor but also the trustee-donees were residents of Wisconsin, and, while it is not so directly stated in the case, it may be inferred that the same thing was true of all the beneficiaries. The residence of the trustees in the state imposing the tax is in itself sufficient to show that the case has no bearing upon the problems now under consideration.

Another significant feature of both *Pearson* v. *McGraw* and *Van Dyke* v. *Wisconsin Tax Commission* not present in the case now before the Court, is that the transfers involved were obviously parts of a plan to evade taxation. No such inference can be drawn from the present record, nor was it even suggested in the findings or opinions of any of the New Jersey courts. It was merely held that the trust deed was executed in contemplation of death, which may be a very different thing and quite innocent of improper connotations. In the *Pearson* case the federal reserve notes had been purchased with the purpose of contending that as tangible personal property they were not subject to the principle of *mobilia sequuntur personam* as applied in tax cases (*Blodgett* v. *Silberman*, 277 U. S. 1). In the *Van Dyke* case, with a similar purpose, the subject matter was converted into the inconvenient and significantly abnormal form of seven and one-half tons of silver dollars.

We submit therefore that the New Jersey inheritance tax statute as applied to these appellants

cannot be sustained on the theory that a transfer to the appellants took place at the time of the execution of the trust deed.

POINT III.

The domicile of the decedent at the time of his death affords no basis for taxation of transfers made at that time.

In some portions of its opinion the Prerogative Court has waivered from the view that the taxable transfer was completed upon the execution of the deed of trust and suggests the theory that perhaps the transfer only commenced at that time, being completed and becoming effective upon the decedent's death. Still elsewhere the chief emphasis is laid upon the decedent's death as the time of transfer. For example it is said:

> "That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency is not true" (R. 47, ll. 9-13).

And again:

> "It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; * * *" (R. 47, ll. 27-29).

And again:

> "Perhaps indeed it might be argued * * * that therefore no transfer—because no completion of

the transfer—occurred until the actual vesting at the death of the grantor" (R. 51, ll. 21-28).

While the thought underlying the first two of these quotations is not entirely clear, it is impossible to believe that the Vice-Ordinary conceived of the transfer as a prolonged process in which every moment was of equal significance. The taxable event must be found at one point or another, at *the beginning or* the end. The situation is similar to the one upon which this Court, in discussing a revocable deed of trust under the federal tax law, expressed itself as follows, by Cardozo, *J.*:

> "Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other."
>
> *Burnet* v. *Guggenheim*, 288 U. S. 280, at p. 285.

Throughout most of his opinion the Vice-Ordinary chose the execution of the deed as the taxable event, and in the preceding point of this brief we have replied to the contentions involved in that theory. We shall now discuss the other theory, both implied in the idea of a continuing transfer and expressly set forth in the third of the foregoing quotations from the opinion of the Prerogative Court, viz., that the transfer took place at the death of the decedent, or

at least that its completion at that time created a taxable event.

If anything that took place at the time of Mr. Atkins' death is pointed to as a taxable event, it was no act of his, nor was it even any failure on his part to take action. After Mr. Atkins had transferred the property to the trustee under the trust agreement in 1929 he had no remaining ownership or title therein, present or future, nor had he any power to affect in any way the course of the devolution of such ownership or title in the future. There was no reserved power of revocation or of appointment, nor did he retain any power over the administration of the trust fund. He had not named himself as a co-trustee or retained any power to name a substitute or successor trustee. The only provision for any relationship whatever to the trust fund, other than the receipt of income therefrom, was the following, viz.:

> "During the lifetime of the grantor, the trustee shall, except in case of emergency, or during the absence or disability of the grantor, consult with the grantor in reference to the sale or other disposition of trust property for the investment or reinvestment of trust funds" (R. 22, ll. 33-37).

Obviously this was not a limitation on the absolute powers of the trustee, but merely a direction for consultation in order that the grantor, if available, should have an opportunity to express his views; the grantor was given no power of veto over the trustee's proposals, nor was his concurrence required for the execution thereof. Full and complete powers of investment were given to the trustee and to the trustee alone (R. 21-22).

The grantor Atkins had of course during his life a right to receive the full net income from the trust (R. 18), but this right did not give him any estate or interest in the property itself, the full title thereto being in the trustee alone.

New York Real Property Law, Section 100.

It is true that upon the death of the life beneficiary the economic benefit of the trust shifted to the appellants. This event definitively settled the succession to the property in the appellants because of their survivorship, such succession having been theretofore undetermined and contingent; and at the same time the appellants acquired the right to the immediate possession of the fund subject only to the distribution and the trustee's accounting. But this transfer of economic benefit, we submit, was not a transfer of anything proceeding out of or from the decedent at that time. The rights which then for the first time came to the appellants were not the same thing which the life beneficiary had theretofore enjoyed, whether it be called property, interest, or right, for the latter was entitled only to the income and not to the fund itself, and even as to such income his status was that of an owner of a right *in personam* against the trustee. It was something very different that the appellants received at the decedent's death, something that was not then owned by the decedent.

At the time of this shift of economic benefit to the appellants on the death of the grantor, the property itself was clearly outside of the jurisdiction of New Jersey. The full legal title was and had been for some years in the New York trustee. Both the actual situs and the ownership were in that state.

and there was no New Jersey ownership with which to construct a fictitious situs through the maxim *mobilia sequuntur personam*.

No decision of this Court has gone so far as to hold that the domicile of the life beneficiary of a trust is sufficient foundation to give the state of such domicile constitutional jurisdiction to tax the shifting of the economic benefit of the trust from the life beneficiary to the remainder when the trust fund is held outside of the state by a foreign trustee and the remaindermen are nonresidents. None of the recent decisions of this Court support that proposition.

In *Curry* v. *McCanless*, 307 U. S. 357, the power of Tennessee to tax the transfer of the trust fund in Alabama was based upon the life beneficiary's power of appointment. In that case Mr. Justice Stone said in delivering the opinion of the Court (p. 372):

> "If it be thought that it is identity of the intangibles with the person of the owner at the place of his domicile, which gives power over them and hence 'jurisdiction to tax', and this is the reason underlying the maxim *mobilia sequuntur personam*, it is certain here that the intangibles for some purposes are identified with the trustee, their legal owner, at the place of its domicile and that in another and different relationship and for a different purpose—the exercise of the power of disposition at death, which is the equivalent of ownership—they are identified with the place of domicile of the testatrix, Tennessee."

A similar result was reached in *Graves* v. *Schmidlapp*, 315 U. S. 657, where the decedent transferred the property at his death through the exercise of a

power of appointment given him by the will of a nonresident over property located outside of the taxing state. The basis of jurisdiction was summarized by the court in the following language (p. 664):

> "Here the relationship of the power to Massachusetts does not leave New York without sufficient control over the donee and his exercise of the power to support its constitutional authority to tax. For the fact remains that he, as a resident enjoying the protection of New York's laws and owing to it the duty of financial support, has disposed of wealth by a will executed and probated in New York with the same result as if he had owned the property. This transmission of wealth at death by a resident is not a forbidden source of revenue to the state."

Likewise, a transfer tax is permissible on the transmission of property located outside of the state where it was held under a trust fund subject to a power of revocation by the donor, a domiciliary of the taxing state, even though such power remained unexercised at the time of his death.

Graves v. *Elliott*, 307 U. S. 383.

The same principle had been earlier applied in the case of a revocable trust.

Baldwin v. *Wisconsin*, 240 U. S. 625.

Even where the decedent's power over the property at the time of his death was limited to the power to change beneficiaries, excluding himself and his estate from the range of choice, a transfer tax at his death with respect to property which he had conveyed in trust during his life was sustained.

Porter v. *Commissioner*, 288 U. S. 436.

This last case, however, dealt only with the construction of the federal estate tax law and involved no question of domicile or sovereignty.

Also a taxable event occurs upon the execution by will of a power of appointment, even though the power is not general but only special.

> *Whitney* v. *State Tax Commission*, 309 U. S. 530.

The principle underlying all of these decisions is declared to be that the power of disposition of property is the equivalent of ownership.

> *Graves* v. *Elliott*, *supra*, at p. 386;
> *Curry* v. *McCanless*, *supra*, at p. 371;
> *Graves* v. *Schmidlapp*, *supra*, at p. 660;
> *Baldwin* v. *Wisconsin*, *supra*, at p. 630.

As already stated, however, the decedent, Atkins, at the time of his death had no power whatever over the trust fund held under the trust which he had created in 1929. If the contention should be made that the mere shifting of the economic benefit from the life beneficiary to the remainder can be made the occasion of a transfer tax by the state of the life beneficiary's domicile, it would appear to make no difference where or by whom the trust was originally created. For example: If A, domiciled in Virginia, should transfer property located in that state to a trustee domiciled therein in trust to pay the income for life to B, a resident of Pennsylvania, the principal upon the death of B to be distributed to residents of California, would it be held that Pennsylvania has a right to impose a transfer tax, on the occasion of B's death, payable either by A, or by

B's estate, or by the ultimate distributees in California?

The concluding paragraph of the opinion of the Prerogative Court suggests that there may have been a transfer out of the decedent at the time of his death of an equitable remainder interest of which he was still the owner until the time of the happening of the contingency which would determine the ultimate devolution (R. 51). We submit that this suggestion is fallacious in the assumption that there was any such undisposed of remainder. The situation is not like that which is found when a testator omits to provide against the failure of all contingencies, with the result that under some circumstances the property may turn out to be undisposed of and the testator to have died, as to such property, intestate. Here the trust deed provided for all contingencies: if neither the grantor's wife, nor either of his sons, nor any issue of his sons should survive him, then the fund is to be paid over to the grantor's brother John; and if John too should be dead, then by the express wording of the deed it is to be paid to the other heirs at law and next of kin of the grantor (R. 20). No contingency is unforeseen, none is left unprovided for. Consequently nothing remained in the grantor subject to his power of disposition at death.

In this connection the Vice-Ordinary has cited *Curry* v. *McCandless*, *supra*, and *Graves* v. *Elliott*, *supra*. As already pointed out, neither of those cases supports his thesis, as in both of them the taxing power of the domiciliary state is sustained on the decedent's reserved powers to control the future ownership, powers which continued down to the very moment of death. Here there was no such power; it had all been surrendered in the deed of trust.

Moreover, the ownership of any such limited equitable interest would not be sufficient to draw the entire property within the taxing power of the state of domicile through the *mobilia sequuntur personam* fiction.

Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83;
Brooke v. Norfolk, 277 U. S. 27.

Conclusion.

The argument made herein for the appellants can be summed up as follows:

The jurisdiction of New Jersey to tax this property or the transfer thereof obviously cannot be based upon the actual location or situs of the property, which was in New York, or upon any protection or privilege derived from the laws or government of New Jersey. Jurisdiction to tax can be based only on the decedent's New Jersey domicile, either to give the property a fictitious location in New Jersey under the maxim *mobilia sequuntur personam* or because of some relationship of the decedent to the property at the time of his death. But no transfer to these appellants took place at the execution of the deed of trust, because their future relationship to the property was wholly speculative and contingent, and the entire title, legal and equitable, was vested in the trustee pending the determination of the contingencies. When the eventual transfer to the appellants took place at the decedent's death, the latter had parted not only with ownership but with every vestige of control, and the ownership as well as the property was located entirely outside of the state. New Jersey's

attempt to tax the transfer is accordingly a denial of due process of law in violation of the Fourteenth Amendment.

The judgment appealed from should be reversed and the cause remanded for reassessment of the tax with instructions to exclude the trust fund.

Respectfully submitted.

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Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1942.

Docket No. 659.

NATIONAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors, etc. and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

against

WILLIAM D. KELLY, State Tax Commissioner of New Jersey,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

APPELLANTS' REPLY BRIEF.

ROBERT McC. MARSH,
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Counsel for Appellants.

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APPELLANTS' REPLY BRIEF.

The appellee's brief presents some new arguments not advanced heretofore, and is also inconsistent with portions of the opinions of the courts below. Moreover, from time to time it mis-construes or mis-states the argument of the appellants. These matters call for a few observations in reply.

I.

Appellee's Mis-statements of Appellants' Arguments.

In several places in the appellee's brief mis-conception of appellants' arguments has resulted in impor-

tant mis-statements. Considerable space is devoted to knocking down straw men and refuting contentions which have never been advanced.

It is said in appellee's brief (p. 9) that:

> "Appellants say that power to tax, because the estates of the donees were of a contingent nature, must be determined as of the date of death of the donor, when the estates of the sons vested indefeasibly. Appellee says that power to tax must be determined as of the date of transfer, and that here the transfer took place as of the date of the execution of the trust agreement."

This is not an accurate representation of the argument in appellants' brief. Appellants have not said that the power to tax must be determined as of the date of the donor's death; they have said that as of such date the power did not exist, because no transfer then took place. Nor have appellants argued that power to tax should be determined as of any date other than the date of transfer; the question they have raised concerns the date of the transfer New Jersey has assumed to tax. The appellee's brief continues by declaring that the New Jersey courts have unanimously held that the taxable transfer took place when the deed of trust was executed. Appellants' brief pointed out that the opinions of the New Jersey courts were not entirely consistent in this matter, and showed considerable uncertainty. (Appellants' Brief, pp. 29-30).

The appellee's brief repeats this misrepresentation of appellants' argument on page 22, where reference is made to the appellants' "principal contention that the power to tax in the case of an *inter vivos* transfer

of future interests of a contingent character must be determined as of the date of death of the donor", and the same assertion is carried into the point heading set forth on the same page. On the contrary, the argument in Point II of appellants' brief is that there is no power to tax a transfer made at the time of the execution of the trust deed, because no transfer was then made *to the appellants;* and in appellants' Point III it is argued that there is no power to tax at the date of the donor's death because there was no transfer *at that time* from the donor's ownership or control. The appellants have never undertaken to fix the time as of which the power to tax must be determined, because they have consistently maintained that under the circumstances of this case there was no power to tax the transfers to the appellants *at any time.*

With respect to the case of *Pearson* v. *McGraw*, 308 U. S. 313, appellee's brief (p. 32) asserts that appellants have indicated that an appraisal and levy were made in that case as of the date of transfer. What appellants' brief actually suggested was (p. 34) merely that the gifts were taxable according to the nature of the interests as they then existed. We agree with appellee that there would be no basis for a statement that the interests had then been actually appraised, because the result of the decision of this Court was to require a valuation which had been theretofore omitted. Appellee's mis-statement, however, is not of any great importance in itself, except as it reveals the weakness of appellee's criticism of our differentiation of *Pearson* v. *McGraw*. It is of course true, as held in *Keeney* v. *New York*, 222 U. S. 525, that postponement of assessment and collection

in the case of a transfer taxable when made is not in itself unconstitutional; but the time of the appraisal and assessment may nevertheless be some indication to show what particular transfer was intended to be taxed.

Another straw man is set up on page 36 of appellee's brief, where it is said:

> "Want of power to tax, appellants argue, is grounded on the fact that the donor in making the transfer, exercised no privilege and received no protection or benefit conferred by the laws of New Jersey, therefore there is no basis for the imposition of a tax (Brief, pp. 17, 18)."

Appellants have never argued that there could be no taxation by New Jersey unless in making the transfer the donor exercised a privilege or received a protection or benefit conferred by its laws. The appellants' brief did indeed point out that no such privilege was exercised and no such protection or benefit conferred in the present case, and therefore no jurisdiction could be based on any such claim. Appellants fully conceded however, that there may be other constitutional bases of tax jurisdiction including, where the facts warrant, that of domicile. Appellants' main argument in fact recognized that the state rests its present claim of taxation chiefly on the decedent's domicile, and was directed to the principles and authorities showing that in this instance the owner's domicile is an insufficient basis.

II.

Appellee concurs with appellants that there was no taxable transfer at decedent's death.

The appellee's brief, as above stated, attributes to the appellants the contention that the power to tax must be determined as of the date of death. This we have shown to be a mis-statement, because appellants have only argued that under no view whatever could power to tax transfers to these appellants exist at that particular time. The appellee has in no manner disputed this argument and has made no attempt whatever to justify a tax as based on a transfer at the decedent's death.

The appellee on the other hand commits himself unreservedly to the proposition that the taxable transfer—the transfer which the State of New Jersey assumed to tax—took place as of the date of the trust agreement. Not only does the brief declare (p. 9) that the New Jersey Courts have so held and that their determination is conclusive; but the proposition is again put forth as follows (p. 21):

> "Since Atkins reserved neither power to appoint, revoke or otherwise control the final disposition of the trust estate, the transfer of the assets in the trust property took place as of the date of the trust agreement."

The appellee thus wholly abandons the alternative theory suggested in the opinion of the Vice Ordinary and treated in Point III of appellants' brief, that there was some kind of a transfer executed or completed when the decedent died. By abandoning this contention appellee appears to have conceded that the

tax now under consideration cannot be supported by the decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott*, *Whitney* v. *State Tax Commission*, and *Graves* v. *Schmidlapp*, in all of which the jurisdiction to tax was based upon the fact that there was a transfer from the decedent's ownership or control at the time of his death. It is true that appellee also uses the *Curry* case to sustain the argument that the deed of trust itself constituted a taxable transfer to these appellants because of the grantor's domicile at the time of the execution of the deed; but we do not read that case as establishing any such broad proposition, regardless of the nature of the interests transferred and the location of the property and of the transferees. Had that view been adopted it would have been entirely unnecessary for this Court to lay stress upon the power of appointment which had been retained by the grantor and remained subject to her will until the time of her death. In fact no point whatever is made in the opinion of the grantor's residence in Tennessee at the time of the execution of the trust deed. Tennessee's jurisdiction to tax was upheld on the ground of the decedent's residence there at the time of her death, and of her reserved control over the property at that time.

III.

Appellee's Illogical Inferences.

Appellee's brief (p. 24) argued that the transfer effected by the deed of trust must have been a transfer to the appellants, in spite of the fact that they would receive nothing until the future and might never receive anything at all, for the reason that if it were

a transfer to the trustee the future devolution of title would depend upon "the independent and voluntary act of the trustee". This suggestion is contrary to the fundamental principles of trust law and ignores the power of courts of equity to enforce fiduciary obligations and, as a short cut, to consider as done that which ought to have been done. Further, the appellee argues that if the trust deed were a transfer only to the trustee, no tax could be levied even if the trustee were a New Jersey bank or an individual residing in that State, because the New Jersey law "does not attempt to impose" an inheritance tax on transfers from trustees to beneficiaries. This is surprising reasoning, because we would presume from the interpretation given the New Jersey statute in the present case the New Jersey courts would hold the existing statute applicable in the instance cited, and concededly in that event it would not be open to the same constitutional objection. Even if the present statute were not applicable, however, there would be no constitutional objection to its amendment.

The same fallacy attaches to the appellee's argument (p. 25) with respect to joint bank accounts and life insurance proceeds, the taxability of the latter being the subject of *Chase National Bank* v. *United States*, 278 U. S. 327, and *United States Trust Company* v. *Helvering*, 307 U. S. 57. These cases undoubtedly held that a transfer through the medium of a third party will ordinarily be subject to an estate tax, as well as a transfer directly from the decedent to the beneficiary, but they do not present any question of extraterritorial jurisdiction.

Appellee's brief (p. 28) quotes from *Carter* v. *Bagbi*, 92 N. J. L. 390. It is unquestionably true

that the transfer to the trustee was not under the New Jersey statute a taxable event, as the Court of Errors and Appeals there held. That court further held that with respect to contingent remaindermen the transfer did not take place at the time of the execution of the trust deed. It is difficult to say whether the authority of that case has been weakened by the decision now appealed from, but the Vice Ordinary's opinion pointed out that he considered much of it to be regarded as dictum and not controlling. (R., pp. 49-50.) The important point is appellee's concession, by this citation, that the tax cannot be sustained as a tax on the transfer to the trustee.

Again, the appellee's brief is illogical in its treatment of *Binney* v. *Long*, 299 U. S. 280, and *Coolidge* v. *Long*, 282 U. S. 582, and in its attempt to avoid the holding in the former that where remainders are contingent their transfer is taxable by a statute enacted subsequent to the deed of trust. The appellee's brief says (p. 23):

"The controlling principle of these cases is in determining power to tax we must look to the date of the deed begetting the transfer. If the power to tax then exists it is within the power of the state to say when and how that power shall be exercised."

Rather, it seems to us, the controlling consideration in these cases was the nature of the future interest in question, whether vested or contingent. In both cases the statute was subsequent to the trust deed, but was held unconstitutional only with respect to remainders theretofore vested. Later, disregarding *Binney* v. *Long*, appellee's brief uses (p. 29) quotations from *Coolidge* v. *Long* to support the argument that the

taxable transfer in the present case took place at the time of the creation of the Atkins trust deed, even though the remainders were held by the New Jersey courts to be contingent, just as those in the *Bigney* case had been held to be contingent.

It is true, as appellee's brief points out (p. 31), the language of the trust deed in the *Coolidge* case was very similar to that in the Atkins trust deed, and an interesting question is raised as to the effect to be given by this Court to the determination of state courts as to the character of particular estates. This Court proclaimed in the *Coolidge* case that such questions are to be determined by this Court for itself; but it is appropriate to point out that appellee nowhere contends that the New Jersey courts were wrong in holding the Atkins future interests to be contingent, as they undoubtedly were in effect even though similar interests have sometimes been described as "vested subject to being divested". The conclusion in *Coolidge* v. *Long*, holding similar remainders sufficiently vested to be safe against retroactive taxation, was dissented from by a strong minority.

IV.

Technical Considerations and Niceties.

Appellee concurs in our suggestion (Appellants' Brief, p. 26) that the decisions in tax cases, no less than others, should be governed by considerations of substance rather than by technical considerations and distinctions which originated in a feudal economy. *Klein* v. *U. S.*, 283 U. S. 231; *Helvering* v. *Hallock*, 309 U. S. 106; *Helvering* v. *Clifford*, 309 U. S. 331.

The boundaries of constitutional jurisdiction for the purpose of taxation are matters of substantial importance and must be determined with an eye to factors other than the collection of revenue. Other policies of government are to be considered, as well as the rights of the individuals concerned, and all are to be kept in balance.

The rights of nonresidents of New Jersey to come into possession of property never within that State, without being taxed by New Jersey on the ground that a domiciliary of that State once owned it, should depend on indisputable realities rather than on fictions. The sole ground of taxation asserted here is based on the maxim *mobilia sequuntur personam*. Whatever meaning this maxim has is derived from a fiction which, "being a fiction is not allowed to obscure the facts, when the facts become important".

> Holmes, *J.*, in *Blackstone* v. *Miller*, 188 U. S. 189, p. 204.

(The case cited, overruled in *Farmers Loan and Trust Company* v. *Minnesota*, 280 U. S. 204, would seem to have been revived in *State Tax Commission* v. *Aldrich*, 316 U. S. 174.)

Whatever name be applied to the relationship of these appellants to the property before the decedent's death, there is no doubt that their hopes and expectations did not turn into reality until long after all ties with the State of New Jersey had been severed. To recreate the former tie by the device of labeling the grantor's deed of 1929 a then present transfer of a future contingent interest, is to fall back on niceties of conveyancing which have been deemed abandoned. Even that device will not cover the case where

no prospective remaindermen are in existence at the time of the execution of the trust deed. Appellee has not attempted to comment on the hypothetical case set forth at the top of page 33 of the appellants' brief.

No concern need be felt that a reversal of the judgment appealed from will open any tax loopholes. If New Jersey wishes to impose an estate or transfer tax on all the transfers under a deed of trust, including transfers of property outside of the state to a foreign trustee for the benefit of contingent remaindermen, it may readily do so either by amending its statute or altering its interpretation of the present statute. A tax on the immediate transfer to the trustee of the entire title would presumably be constitutional, at any rate would not raise the questions here present. Both the New Jersey courts and the appellee however, say that that transfer is not the one intended to be taxed by the statute now in force.

V.

Non-taxability in New York.

One further point in appellee's brief requires notice but not extended argument. It is there pointed out (p. 37) that if the transfer is not taxed by New Jersey, it may not be taxed at all, because of the policy of the State of New York now embodied in the constitution of that State and the absence of any appropriate statute.

Acceptance of the principle of double taxation has meant that taxability by one state is to be determined independently of the question of taxability by an-

other. It is obvious that New York's failure to exe
cise its rights in that regard, for whatever reaso
will not enlarge the jurisdiction of New Jersey.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS, ETC., ET AL.,

Appellants,

vs.

WILLIAM D. KELLY, STATE TAX COMMISSIONER OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

DAVID T. WILENTZ,
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WILLIAM A. MOORE,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF GEORGE W. E. ATKINS, DECEASED, AND GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, INDIVIDUALLY,

Appellants,

vs.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER (WILLIAM D. KELLY, SUCCESSOR),

Appellee.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTIONS TO AFFIRM OR DISMISS.

Nature of Case.

Appellants seek review of a judgment of the New Jersey Court of Errors and Appeals upholding an assessment of transfer inheritance taxes on a certain *inter vivos* transfer

in trust. They allege that the New Jersey inheritance tax law under which the tax was levied is repugnant to the Fourteenth Amendment to the Constitution of the United States because (a) the intangible personal property, the transfer of which was subjected to tax, did not have a taxable situs within the state at the time of transfer; (b) the transfer occurred outside the state; (c) the agreement of trust effectuating the transfer was executed outside the state; and (d) the trustee and beneficiaries were domiciled outside the state.

Statement of Facts.

1. George W. E. Atkins, the donor, died testate November 9, 1936 (State of Case before the New Jersey Court of Errors and Appeals, p. 17—hereinafter referred to simply as the "S. C.").

2. On May 16, 1929 the donor, at the age of 79 (S. C. 71), and concurrently with the signing of his last will and testament (S. C. 26), executed an agreement of trust under which he conveyed approximately two-thirds of his estate in trust, the income therefrom to be paid to him for his life, and on his death to pay said income, less $2,400 annually for each of his two sons, to his wife, for her life, if she survived him (which she did not), the corpus on the death of the survivor of himself and his wife to be divided equally between his two sons, with further provisions for disposition should either or both of his sons not then be living. (S. C. 27-35).

3. No power to alter, amend, revoke or appoint the trust was reserved to the donor.

4. The agreement was executed in the City and State of New York (S. C. 39); the trustee, Central-Hanover Bank and Trust Company, is a banking corporation of that state (S. C. 38); and the two sons are nonresidents of the State of New Jersey. (S. C. 19).

5. The assets comprising the corpus of the trust were at all material times intangible personal property physically present in the State of New York, being securities which, from about May 15, 1924, had been in the custody of the Central Union Trust Company of New York City, predecessor of appellant, the Central Hanover Bank and Trust Company, and the latter, in a safe-keeping account in the donor's name, and they remained in that state to the date of the donor's death (S. C. 35, 39).

6. The donor was legally domiciled in the State of New Jersey at the time of the creation of the trust, during all of the time intervening the execution of the trust and the date of his death, and at the time of his death (S. C. 29, 35, 36, 38).

7. The State Tax Commissioner determined that the corpus of this *inter vivos* trust constituted a part of the taxable estate of the decedent for inheritance tax purposes because the transfer thereof was intended by the donor to take effect in beneficial possession and enjoyment at or after his death, within the intendment of the transfer inheritance tax laws[1] of the State of New Jersey, and that the transfer

---

[1] Chapter 228, Laws of New Jersey 1909, section 1, subsection "Third", effective July 4, 1909, as amended by Chapter 144, Laws of 1929, effective April 22, 1929, provided that:

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars ($500) or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, exempt as hereinafter provided, in the following cases:

* * * * * * * *

"Third: When the transfer is of property made by a resident, * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *"

And Chapter 303, Laws of 1931, Chapter 244, Laws of 1934 and Chapter 89, Laws of 1935 (now R. S. 54:34-1c) continued this provision in identi-

of said intangible personal property was within the power of this state to tax, notwithstanding the physical presence of said property in the hands of the donor's agent and trustee in the State of New York at the time of the creation of the trust and the date of his death.

8. The Prerogative Court, to which taxpayers appealed (R. S. 54: 34-13), ruled that the transfers arising out of this *inter vivos* trust were taxable not only as gifts intended to take effect in beneficial possession or enjoyment at or after the donor's death, but also as gifts made by the donor in contemplation of his death, and that the transfer of the property comprising the corpus of the trust was within the taxing power of this state (129 N. J. Eq. 186—S. C. 95; 198, 110).

9. The Supreme Court, in a *per curiam*, affirmed the decree of the Prerogative Court for the reasons stated by Vice-Ordinary Buchanan, who advised the decree below (127 N. J. Law 468—S. C. 133).

10. And the Court of Errors and Appeals affirmed the judgment of the Supreme Court on the same grounds (129 N. J. Law 127—Transcript of Record.

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cal language down to the date of the decedent's death on November 9, 1936.

Chapter 228, Laws of 1909, section 26 (now R. S. 54:33-1) further provided that:

> "26. The words 'estate' and 'property', wherever used in this act, except where the subject or context is repugnant to such construction, shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, *whether such property be situated within or without this state*. The word 'transfer', as used in this act, shall be taken to include the passing of property, or any interest therein, *in possession or enjoyment, present or future*, by distribution by statute, descent, devise, bequest, grant, *deed*, bargain, sale or *gift*."
>
> [All emphasis herein by appellee.]

11. It was determined by the Prerogative Court (129 N. J. Eq. 208—S. C. 110), and approved by both appellate courts that the taxable transfers occurred on the execution and delivery of the trust agreement, and since at that time the donor was legally domiciled in New Jersey and the property transferred was intangible in nature, this state had the power to tax, notwithstanding the interests so transferred could not vest in the particular beneficiaries until at or after the donor's death.

12. The statute under which New Jersey claims a tax took effect July 4, 1909 (Chapter 228, Laws of New Jersey, 1909, as amended) many years prior to the date of the transfer, which occurred on May 16, 1929.

13. The only question on this appeal is whether the State of New Jersey, without violating the due process and equal protection of the law clauses of the Federal Constitution, may subject to inheritance taxation the transfer, by a person legally domiciled in this state, of intangible personal property, where that intangible personal property has a physical situs elsewhere, the trustee and the beneficiaries for whose benefit the transfers were made are legally domiciled in another state or states, and the estates of the beneficiaries are dependent for their possession and enjoyment upon the happening of future events.

14. Because the determination of this issue by the Courts of New Jersey seems to be so clearly supported by the decisions of this Court, appellee, by motions included herein, moves that the judgment of the Court of Errors and Appeals be summarily affirmed, or, in the alternative, that the appeal allowed herein be dismissed, for the following reasons:

I.

Reasons in Support of Motion to Affirm Judgment of the Court of Errors and Appeals.

1. The judgment under review should be affirmed on the specific authority of

Pearson v. *McGraw*, 308 U. S. 313;
VanDyke v. *Wisconsin Tax Commission*, 311 U. S. 605;

and on the applicable legal principles announced by this Court in

Curry v. *McCanless*, 307 U. S. 357;
Graves v. *Elliott*, 307 U. S. 383;
Graves v. *Schmidlapp*, 315 U. S. 657 (Prel. Print);
Blodgett v. *Silberman*, 277 U. S. 1.

Pearson v. *McGraw*, *supra*, is indistinguishable from the instant matter on the controlling facts and legal principles involved. In that case the donor was domiciled in the State of Oregon at the time of the transfer and the date of his death; the subject-matter of the transfer had for several years been in the custody of an Illinois trust company as donor's agent in collecting principal and income and reinvesting funds; and on August 15, 1935, about six months before death and in contemplation thereof, he transferred the property then in the hands of the trust company, as his agent, to the trust company, as trustee, under an agreement of trust executed in Oregon on that date. The right of the State of Oregon to an inheritance tax on the transfer was upheld by this Court on the authority of *Curry* v. *McCanless*, *supra*, and related cases, notwithstanding the fact that the donor did not reserve a power to alter, amend or revoke the trust agreement, or appoint the trust estate. True, it appears that the trust agreement in that case was actually executed by the donor in the State of Oregon, while here

the agreement was executed in New York, but that is a distinction of no significance in view of this Court's subsequent ruling in *VanDyke* v. *Wisconsin Tax Commission*, *supra*, where the trust of a Wisconsin donor was executed in Illinois and a Wisconsin gift tax on the transaction was sustained on the authority of *Pearson* v. *McGraw*, *supra*, although the gift of approximately seven and one-half tons of silver dollars was actually consummated in Illinois. As Justice Stone said in *Curry* v. *McCanless*, *supra* (at p. 368):

> "* * * it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax * * *."

Consequently, it is wholly immaterial that the trust instrument was executed and the securities delivered by the donor to the trustee in the State of New York. *Pearson* v. *McGraw* and *VanDyke* v. *Wisconsin Tax Commission*, *supra*, conclusively foreclose every contention of appellants here and justify summary affirmance of the judgment under review.

2. Jurisdiction to tax in the instant case is predicated not upon the fact of physical presence here of the donor's property, but upon the dominion and control of New Jersey over the donor—the property transferred being intangible. Domicile of the owner of intangible personal property within the taxing state in itself affords an adequate constitutional basis for imposing a tax on his testamentary or *inter vivos* transfer of said property even though it be physically located without the taxing state.

> "* * * A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent. *From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis*

for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

Curry v. *McCanless*, *supra* (at pp. 366, 367).

". . . For constitutionally the property was 'within the jurisdiction of the state' of Oregon *since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner.*"

Pearson v. *McGraw*, *supra* (at p. 318).

". . . As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death. *Curry* v. *McCanless*, *supra*, and cases cited."

Graves v. *Elliott*, *supra* (at p. 387).

3. Equally well settled by the decisions of this Court is the fact that it is wholly immaterial whether the intangibles transferred by the donor in trust had, prior to the transfer, acquired a business situs in the State of New York, since the power of the state of business situs to tax cannot deprive the state of domicile of the owner of the intangibles of its power to tax their transfer.

Curry v. *McCanless*, *supra* (at pp. 367-368);

Graves v. *Elliott*, *supra*;

Graves v. *Schmidlapp*, *supra* (at p. 661).

Although it should be observed that the State of New York for a long time has had no statute for the taxation of the

transfer of intangibles of nonresidents; in fact, by a Constitutional amendment effective January 1, 1939 (Art. XVI, sec. 3) that state has precluded taxation under circumstances such as exist in the instant matter.

4. It is immaterial that the trustee and beneficiaries of the trust were not residents of the State of New Jersey, or that the trust *res* was physically present in the State of New York.

Kenney v. *New York*, 322 U. S. 525, 537;
Graves v. *Schmidlapp*, *supra*, (at p. 661).

5. In disposing of this case each of the New Jersey courts ruled (a) that the taxable transfers occurred when the deed of trust was executed and delivered (S. C. 116); (b) that the transfers pursuant to the deed were made in contemplation of and intended to take effect in possession and enjoyment at or after the death of the donor (S. C. 95); (c) that the inheritance tax laws of this state (Chapter 228, Laws of 1909, section 1, as amended to the date of the trust) specifically provide for the taxation of *inter vivos* transfers so made; and (d) that said laws extend the power to tax to intangible personal property wherever situated when owned by a resident transferor. These characterizations of the transfers and the interpretation of the scope of the tax law of New Jersey by its courts will be accepted as conclusive here; the only question being whether the transfers as so construed and the law as so applied violate any provision of the Constitution of the United States.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 270, and cases there cited.

6. As previously observed, each of the New Jersey courts ruled that the taxable event occurred in 1929 when the deed was executed, and that liability to tax then attached. In this they plainly acted properly, since this Court long ago ruled

that the validity of the burden of the tax must be determined by the situation as it exists when the deed is made.

Keeney v. *New York*, *supra* (at p. 537).

7. Where the power to tax exists it is for the state to say when and how the amount of the tax shall be ascertained and paid. That the transfers were valued and the tax assessed as of the date of death of the donor, while liability for the tax attached when the transfer was made in 1929, presents no federal question.

> "* * * The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to a remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of the grantor in 1907, does not present any Federal question."
>
> *Keeney* v. *New York*, *supra* (at p. 537).

> "* * * The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* v. *Brewster*, 203 U. S. 543."
>
> *Salomon* v. *State Tax Commission*, 278 U. S. 484, 490.

8. The applicable inheritance tax law of the State of New Jersey is Chapter 228, Laws of 1909, section 1, as amended to the date of the execution of the deed of trust. The trust deed was not executed until 1929, so that we are not here confronted with the question of constitutionality of an attempt to retroactively apply the tax law, and, therefore, cases such as *Coolidge* v. *Long*, 282 U. S. 582, and *Binney* v. *Long*, 299 U. S. 280, cited by appellants at page 14 of their jurisdictional statement, are without controlling effect.

9. That the property transferred *inter vivos* was not owned by the donor at the moment of his death is without controlling effect on the question of jurisdiction to tax.

Whitney v. *State Tax Commission of New York*, 309 U. S. 530, 538-540.

10. It is respectfully submitted that the judgment of the Court of Errors and Appeals should be summarily affirmed on motion, since the issues here involved have been so plainly foreclosed by the determination of this Court in *Pearson* v. *McGraw*, *VanDyke* v. *Wisconsin Tax Commission*, *Curry* v. *McCanless*, and *Graves* v. *Elliott*, *supra*, as to render further argument wholly unnecessary.

II.

Reasons in Support of Motion to Dismiss the Appeal.

1. The presence of a *substantial* federal question is essential to sustain jurisdiction in this Court. If the questions pleaded are plainly unsubstantial, jurisdiction is wanting.

Levering and Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality is unsubstantial where (a) it is "obviously without merit", or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32.

Levering and Garrigues Co. v. *Morrin*, *supra* (at pp. 105, 106).

2. That every constitutional issue attempted to be raised by the petition herein has been explicitly foreclosed by the previous decisions of this Court, as set forth in Point I, seems quite apparent. Specifically, *Pearson* v. *McGraw*, and *VanDyke* v. *Wisconsin Tax Commission*, *supra*, leave no room for the inference that the questions sought to be raised and presented for further consideration can be the subject of further controversy.

3. It is respectfully submitted, therefore, that the constitutional questions urged by appellants have been so plainly foreclosed by the decisions of this Court as to leave no room for real controversy, and the appeal (if not affirmed) should be dismissed for want of a substantial federal question.

Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 311.

Zucht v. *King*, 260 U. S. 174, 176.

McArthur v. *United States*, 315 U. S. 787 (Prel. Print).

Motion to Affirm Judgment of the New Jersey Court of Errors and Appeals.

Therefore, comes now the appellee herein, successor to J. H. Thayer Martin, State Tax Commissioner, by his attorney, and moves the Court to affirm the judgment from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that every question on which the decision of the cause depends has been so explicitly foreclosed by the previous decisions of this Court as to render further argument thereof unnecessary.

In the alternative:

Motion to Dismiss the Appeal.

Therefore, comes now the appellee herein, successor to J. H. Thayer Martin, State Tax Commissioner, by his attorney, and moves the Court to dismiss the appeal for want of a substantial federal question.

DAVID T. WILENTZ,
Attorney General of New Jersey,
Attorney for Appellee.
WILLIAM A. MOORE,
Of Counsel.

Dated: December 29, 1942.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

...RAL HANOVER BANK AND TRUST COM...

...GEORGE CHAW ATKINS and JOHN ...TON ATKINS, ...

...WILLIAM D. KELLY, ...

APPELLEE'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last will and testament of GEORGE W. E. ATKINS, deceased, and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

vs.

WILLIAM D. KELLY, State Tax Commissioner (Successor to J. H. Thayer Martin),

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

APPELLEE'S BRIEF.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW.

This case in the Courts of the State of New Jersey is cited *sub nom. Central Hanover Bank and Trust Company vs. Martin.* William D. Kelly was substituted for J. H. Thayer Martin as State Tax Commissioner by order entered

in the Court of Errors and Appeals (Record 68). The opinions of the State Courts are officially reported as follows:

Court of Errors and Appeals (Opinion by Heher, J., September 18, 1942—R. 66), 129 N. J. Law 127.

Supreme Court (*Per Curiam*, January 5, 1942—R. 62), 127 N. J. Law 468.

Prerogative Court (Opinion by Vice-Ordinary Buchanan, February 14, 1941—R. 28), 129 N. J. Eq. 186.

STATEMENT OF GROUNDS OF JURISDICTION.

This appeal is brought pursuant to the provisions of Title 28, sec. 344(a), United States Code—Judicial Code, sec. 237(a)—as amended, from a final judgment of the Court of Errors and Appeals (the highest court of the State of New Jersey in which a decision in this suit could be had) upholding the constitutionality of the New Jersey Inheritance Tax Law and an assessment of inheritance taxes thereunder. Said judgment was entered September 18, 1942 (R. 67), and application for order allowing appeal was presented and appeal allowed December 15, 1942 (R. 69, 77).

Motions to affirm or dismiss for want of a substantial federal question were denied and probable jurisdiction noted by order of February 15, 1943 (R. 80).

STATEMENT OF FACTS.

The facts material to a consideration of the issues raised on this appeal are adequately stated by appellants (their Brief, 2-5).

SPECIFICATION OF ERRORS

While four grounds have been assigned by appellants for the reversal of the judgment appealed from (R. 74) the substance thereof, concisely stated, is that the New Jersey Inheritance Tax Law and the assessment thereunder are repugnant to the due process and equal protection of the law clauses of the Fourteenth Amendment because

(a) the intangible personal property, the transfer of which, in trust, was subjected to a domiciliary inheritance tax, had its situs in the State of New York, and outside of the State of New Jersey; and

(b) the transfer thereof occurred outside of the State of New Jersey, and beyond the jurisdiction of said state.

The only question, therefore, is whether the New Jersey Inheritance Tax Law, construed to provide a tax under the circumstances of this case, deprives appellants of their property without due process of law or denies to them the equal protection of the law.

SUMMARY OF ARGUMENT

The donor was a resident of New Jersey at all times and the property transferred was exclusively intangible in character. Those are the decisive facts.

Domicile of the owner, in itself, supports the power to tax the transfer of intangibles wherever situated. *Curry* vs. *McCanless*, 307 U. S. 357, 366, 367; *Pearson* vs. *McGraw*, 308 U. S. 313, 318. See also *Lawrence* vs. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel Cohn* vs. *Graves*, 300 U. S. 308, 313. This is so whether the transfer be at death by will, *Blodgett* vs. *Silberman*, 277 U. S. 1; or *inter vivos* by gift in contemplation of death, *Pearson* vs. *McGraw*, *supra;* or to take effect at or after death,

Curry vs. *McCanless, supra; Graves* vs. *Elliott*, 307 U. S. 383; *Bullen* vs. *Wisconsin*, 240 U. S. 625; and whether the transfer be complete when made as in *Pearson* vs. *McGraw, supra; VanDyke* vs. *Wisconsin Tax Commission*, 311 U. S. 605; or subject to reserved control by the donor until death as in *Curry* vs. *McCanless, supra; Graves* vs. *Elliott, supra; Bullen* vs. *Wisconsin, supra; Keeney* vs. *New York*, 222 U. S. 525.

The instant transfers, appellants concede, were made in contemplation of and intended to take effect at death. To prevent evasion such transfers may be taxed along with transfers at death without violating the Federal Constitution. *Milliken* vs. *United States*, 283 U. S. 15, 20; *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509, 513; *Coolidge* vs. *Long*, 282 U. S. 582, 596. They were completed on May 16, 1929 (twenty years subsequent to the effective date of Chapter 228, Laws of New Jersey 1909). The validity of the tax must be determined by the situation as it existed in 1929, when the deed was made, *Keeney* vs. *New York, supra* (at page 537). The taxable event is a transfer *inter vivos*. *Helvering* vs. *Hallock*, 309 U. S. 106, 111.

Where the power to tax exists, it is for the State to say when the property shall be valued, at what rate it shall be taxed, and when the tax shall be levied and paid. The measure of the tax is the value of the transferred property at the time when death brings it into enjoyment. A tax so measured does not violate the due process clause. *Keeney* vs. *New York, supra* (at page 537); *Helvering* vs. *Hallock, supra* (at page 111); *Salomon* vs. *State Tax Commission*, 278 U. S. 484, 490; *Klein* vs. *United States*, 283 U. S. 231; *Milliken* vs. *United States, supra*.

In determining whether the state then had the power to tax it is wholly immaterial whether the estates transferred were vested, defeasible or contingent, since questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases, or by the

application of technical considerations, the niceties of the law of trusts or conveyances, or the refinements of the law of vested and contingent remainders. *Helvering* vs. *Clifford*, 309 U. S. 331, 334; *Helvering* vs. *Hallock*, *supra* (at pages 117, 118); *Pearson* vs. *McGraw*, *supra* (at page 318); *Klein* vs. *United States*, *supra* (at page 234); *Smith* vs. *Shaughnessy* (decided February 15, 1943—not yet officially reported), 87 L. Ed. (Adv. Op.) 504, 506, 63 S. Ct. 545, 547.

Taxation being a practical matter, it is equally unimportant that the transfers were effected through a trustee rather than directly from the donor to the donees, *Chase National Bank* vs. *United States*, 278 U. S. 327, 337; *United States Trust Co.* vs. *Helvering*, 307 U. S. 57, 60; and that the donor was not the *owner* of the property transferred at the time of death. *Whitney* vs. *Tax Commission*, 309 U. S. 530, 538, 539.

Every issue raised on this appeal is resolved adversely to appellants by the decisions of this Court in *Pearson* vs. *McGraw*, *supra*; *VanDyke* vs. *Wisconsin Tax Commission*, *supra*; and by the applicable principles announced in *Curry* vs. *McCanless*, *supra*; *Graves* vs. *Elliott*, *supra*; *Bullen* vs. *Wisconsin*, *supra*; *Graves* vs. *Schmidlapp*, 315 U. S. 657.

ARGUMENT.

POINT I.

The New Jersey Inheritance Tax Law Specifically Provides for the Taxation of the Testamentary, Intestate and Inter Vivos Transfer by a Resident of Intangible Personal Property Wherever Situated.

Chapter 228, Laws of 1909,[1] as amended by Chapter 144, Laws of 1929, section 1, subsection "Third," being the law in effect on May 16, 1929, when the trust agreement was executed, provided that:

> "1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars ($500.00) or over, or of *any interest therein*[2] or income therefrom, *in trust* or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:
>
> "First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.
>
> . . . . . .
>
> "Third. When the transfer is of property *made by a resident*, * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *".

These provisions were continued in identical language down to the date of the decedent's death on November 9, 1936 (see Chapter 303, Laws of 1931; Chapter 244, Laws

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(1) Entitled: "An act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases."

(2) All emphasis herein, unless otherwise noted, is by appellee.

of 1934; and Chapter 90, Laws of 1935—now Revised Statutes of New Jersey, 54:34–1c).

Section 26, Chapter 228, Laws of 1909 (now R. S. 54:33–1) directed that:

> "26. The words 'estate' and 'property,' wherever used in this act, except where the subject or context is repugnant to such construction shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, *whether such property be situated within or without this State.* The word 'transfer,' as used in this act, shall be taken to include the passing of property, *or any interest therein, in possession or enjoyment, present or future*, by distribution by statute, descent, devise bequest, grant, *deed*, bargain, sale or *gift*."

It is clear, therefore, that the law from its effective date, July 4, 1909, to the date of decedent's death on November 9, 1936, specifically provided for a tax on the *inter vivos* transfer of property, *or any interest therein, in trust* or otherwise, "whether such property be situated within or without this state," when such transfer of *possession or enjoyment, present or future*, by *deed or gift*, was made by a resident in contemplation of or to take effect at or after death.

POINT II.

The Interpretation of the Law and the Determination by the Highest Court of the State That the Transfers Sub Judice Were of a Taxable Character Are Accepted as Conclusive Here.

The Court of Errors and Appeals, by adopting as its own the reasons given by the Prerogative Court for the affirmance of the tax, has specifically ruled that:

1. The tax law imposes a tax on the transfer of intangible personal property, wherever situated, when made by a resident in contemplation of or intended to take effect in possession or enjoyment at or after death (R. 36, 49).
2. The instant transfers were, under the facts, made in contemplation of death and intended to take effect in possession and enjoyment at the death of the donor (R. 36, 37).
3. The power to tax must be determined as of the date of the taxable event, i.e., in this instance, as of the date of the creation of the right to possession or enjoyment, present or future (R. 49).
4. The transfer here of all rights to future possession and enjoyment of the trust estate took place on May 16, 1929, when the trust was executed (R. 47).

This Court accepts as conclusive the interpretation placed upon the State tax law by the State Courts,

Guaranty Trust Co. vs. *Blodgett*, 287 U. S. 509, 513;
Saltonstall vs. *Saltonstall*, 276 U. S. 260, 270;
Stebbins vs. *Riley*, 268 U. S. 137, 146;
Orr vs. *Gilman*, 183 U. S. 278, 283;

as it does the State Courts' characterization of the transfers, and construction of the deed of trust,

Saltonstall vs *Saltonstall*, *supra* (at p. 270);
Orr vs. *Gilman*, *supra* (at pp. 283, 288);

leaving only the question as to whether the statute as so interpreted and applied to the transfers under consideration violates any provision of the Federal Constitution.

POINT III.

Power to Tax Must Be Determined As of the Date of Transfer, i. e., In This Instance, As of the Date of Creation of the Trust; and the Power Then Existed.

The controversy here arises principally out of differences in approach to the undisputed facts. While there are divergent views between the parties as to the import and application of certain decisions of this Court to the established facts of this case, the principal issue is the time as of which power to tax must be settled. Appellants say that power to tax, because the estates of the donees were of a contingent nature, must be determined as of the date of death of the donor, when the estates of the sons vested indefeasibly. Appellee says that power to tax must be determined as of the date of transfer, and that here the transfer took place as of the date of the execution of the trust agreement.

The New Jersey Courts have unanimously held that the taxable transfer in this case took place when the deed of trust was executed. That this determination is as conclusive here as their interpretation of the State tax law seems settled by the rulings of this Court in

Orr vs. *Gilman*, 183 U. S. 278, 288; and
Chanler vs. *Kelsey*, 205 U. S. 466, 476-478.

"* * * The Court of Appeals held that it was the *execution* of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. * * *"

Orr vs. *Gilman*, *supra* (at p. 288).

"As in *Orr* vs. *Gilman*, 183 U. S. *supra*, we must accept this decision of the New York Court of Appeals holding that it is the *exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed.* * * *"

Chanler vs. *Kelsey*, *supra* (at p. 478).

For the purpose of determining liability of the transfers to a domiciliary inheritance tax it was competent for the New Jersey Courts to construe the trust agreement, and they did construe it, to create equitable estates, the transfer of which at that time might be subjected to tax. Every estate in the trust property coming into possession and enjoyment, present or future, arose out of and by reason of the deed, and the State Courts acted well within their rights in holding that the taxable event was the transfer *inter vivos* insofar as determination of the question of power to tax was concerned. The same view was taken by this Court in *Helvering* vs. *Hallock*, 309 U. S. 106, in disposing of the taxability of a transfer under section 302 (c) of the Revenue Act of 1926, likewise taxing transfers in contemplation of and intended to take effect at death, where it was held that (at pages 110, 111):

"Section 302 (c) deals with property not technically passing at death but with interests theretofore created. *The taxable event is a transfer inter vivos.* But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."

The Prerogative Court ruled that (R. 47-48):

> "Since it must be conceded that a transfer to the sons did occur; that it was effected solely by the trust deed; that that deed was made solely by the owner-grantor; that from the moment that deed was executed and delivered, it and the transfers therein and thereby made were utterly beyond any and all power of the grantor to revoke, amend or in any wise control, *it necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him at the time he executed and delivered the deed;* and, since at that time he was domiciled in New Jersey, New Jersey has the right to tax that transfer, notwithstanding the interest so transferred did not vest in the particular beneficiary until the grantor's death."

In *Keeney* vs. *New York*, 222 U. S. 525, a trust of intangibles was created by a New York resident with a New Jersey trustee in 1903. The donor died a resident of New York in 1907, and that state levied an inheritance tax on the resulting transfers. In sustaining the assessment this Court said (at page 537):

> "But the statute does not impose a tax on the property, but on the transfer. *The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made.* At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, * * *."

See also:

Paul, Federal Estate and Gift Taxation, Vol. 1, sec. 2.13, pages 139, 140.

Residence of the donor within the State at the time of transfer, and the intangible character of the property transferred, are sufficient in themselves to justify jurisdiction to tax. The New Jersey courts have so ruled in this case on the authority of the previous decisions of this Court.

All subjects over which the sovereign power of a state extends are objects of taxation.

McCullough vs. *Maryland*, 17 U. S. 316, 429.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660.
Curry vs. *McCanless*, 307 U. S. 357, 366.
State Tax Commission vs. *Aldrich*, 316 U. S. 174, 177.

Intangibles and their transfer may be taxed by the state of domicile of their owner.

Blodgett vs. *Silberman*, 277 U. S. 1.
Curry vs. *McCanless*, 307 U. S. 357, 367, 372.
Lawrence vs. *State Tax Commission*, 286 U. S. 276, 280.

Domicile in itself establishes a basis for taxation where the transfer is of property of an intangible nature. Enjoyment of the privileges of residence within the State and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government.

Lawrence vs. *State Tax Commission*, 286 U. S. 276, 279.
New York ex rel. Cohn vs. *Graves*, 300 U. S. 308, 313.
Curry vs. *McCanless*, 307 U. S. 357, 366, 367.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660.
First Bank Corp. vs. *Minnesota*, 301 U. S. 234, 240, 241.
Pearson vs. *McGraw*, 308 U. S. 313, 318.

"• • • domicile in itself establishes a basis for taxation. • • •"

Lawrence vs. *State Tax Commission, supra* (at page 279).

"• • • From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of the government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. *Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state,* or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. • • •"

Curry vs. *McCanless, supra* (at pages 366, 367).

That the intangibles here had a physical situs in the State of New York is not material. The power of the state of domicile of the owner of intangibles to tax their transfer is not foreclosed, under the due process or equal protection clauses of the Federal Constitution, by the fact that they are physically present in another state. Under the maxim *mobilia sequuntur personam* intangibles are ascribed a situs for taxation at the domicile of their owner wherever their physical presence may be.

Blodgett vs. *Silberman*, 277 U. S. 1, 10.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660, 661.
Curry vs. *McCanless*, 307 U. S. 357, 366, 367.
Graves vs. *Elliott*, 307 U. S. 383, 387.
Pearson vs. *McGraw*, 308 U. S. 313, 318.

A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent.

Curry vs. *McCanless*, 307 U. S. 357, 366.

And it might also be mentioned at this point that it is not material that the trust agreement was executed in New York and the trust fully administered there.

> "* * * it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax. * * *."
>
> *Curry* vs. *McCanless*, 307 U. S. 357, 368.

If the rule were otherwise, the domiciliary tax in the *Curry*, *Elliott*, *Pearson*, *Van Dyke* and *Bullen* cases could not have been sustained, as the trust in each of those cases was administered in a state other than the domicile of the transferor. As the Prerogative Court observes, the New Jersey act contains no requirement that the trustee and beneficiaries shall be legally domiciled in this State, or that the agreement of trust shall be executed, delivered and administered here (R. 42).

Appellants say that operation of the *mobilia sequuntur personam* "maxim is not effective to give a state power to levy a direct property tax thereon where the resident of the taxing state has only an equitable interest therein and the legal title is held elsewhere," citing *Brooke* vs. *Norfolk*, 277 U. S. 27; *Safe Deposit and Trust Co.* vs. *Virginia*, 280 U. S. 83. (Appellants' Brief, 12.) While not necessary to go so far in the instant matter, it would seem that that is exactly what this Court said could be done in *Stewart* vs. *Pennsylvania*, 312 U. S. 649, aff'g, 338 Pa. 9, 12 Atl. (2d) 444, where the right of Pennsylvania to assess a personal property tax was upheld on the authority of the *Curry* and *Elliott* cases, notwithstanding that the trust property was

physically present in New York, the legal title thereto was held by a trustee in New York and the only interest the Pennsylvania resident had therein was an estate for life.

On the foregoing general principles the Courts of New Jersey have upheld the validity of the present assessment and the constitutionality of the act under which it was assessed.

This brings us to a consideration of the following specific cases in which these principles have been applied by this Court in analogous situations, and which appellee contends are so directly to the point and which so conclusively resolve the jurisdictional issues raised by appellants as to render them wholly unsubstantial at this time.

Pearson vs. *McGraw*, 308 U. S. 313.
VanDyke vs. *Wisconsin Tax Commission*, 311 U. S. 605.
Curry vs. *McCanless*, 307 U. S. 357.
Graves vs. *Elliott*, 307 U. S. 383.
Graves vs. *Schmidlapp*, 315 U. S. 657.
Bullen vs. *Wisconsin*, 240 U. S. 625.

In *Pearson* vs. *McGraw*, *supra*, the jurisdiction of the State of Oregon to impose an inheritance tax on an *inter vivos* transfer made in contemplation of the death of the donor and to include the property transferred in the decedent's taxable estate at death, notwithstanding the fact that the property transferred was at all material times physically present in the State of Illinois, was upheld by this Court solely on the ground that the donor was domiciled in Oregon at the time of the transfer. It had been the custom of the donor (as in the present case) for many years prior to the transfer, to keep his securities with an Illinois Trust Company, under an agency agreement for the collection of principal and income and the investment of his funds. "When decedent established a domicile in Oregon in 1933, he continued that arrangement with the Illinois

trust company, with the result that those securities were always physically present in Illinois, never in Oregon" (page 314). On August 8, 1935, about six months before death, he directed the trust company to liquidate sufficient of his holdings in the agency agreement which with certain cash balances of his with the trust company would equal $450,000, and to acquire therewith forty-five $10,000 federal reserve notes (paper money). This was done and approximately a week later he executed a trust agreement, in Oregon, in contemplation of death, designating the Illinois trust company trustee, to which he transfererd the notes, to be held under the trust for the benefit of his daughter, son, their spouses and children. The trust, as here, was irrevocable, and under it the donor retained no interest, control or power whatsoever. Citing *Curry* vs. *McCanless* "and related cases" this Court held that control by the State of Oregon over the owner of the property was sufficient to support jurisdiction to tax.

Appellee respectfully submits that there is no material factual difference between that case and this one, except that there the property actually transferred was paper money (which may or may not have the characteristics of tangible personalty), while here the transferred property was at all times intangible. In each case the transfer was made in contemplation of death, by a resident donor of intangibles located elsewhere.

In *VanDyke* vs. *Wisconsin Tax Commission*, *supra*, the donor, a Wisconsin resident, executed trusts in Illinois, naming residents of Wisconsin as trustees. No interest in or control over the trust estates was reserved by the donor. The property transferred consisted of seven and one-half tons of silver dollars ($275,000) converted shortly before the transfer from federal bonds physically present in Illinois. The power of Wisconsin to collect a gift tax on the transfer based on the donor's domicile in that state, even though the subject matter of the gift had a physical

situs outside the state, was sustained on the authority of *Pearson* vs. *McGraw*.

In *Curry* vs. *McCanless, supra*, the decedent, a resident of Tennessee, had reserved income for life and a power to appoint the corpus of a trust estate created by her in Alabama, with personal property which always had a physical situs in Alabama, and the trustee was a corporation of that state and wholly administered the trust there. In *Graves* vs. *Elliott, supra*, the decedent, a resident at the time of her death of New York, had created a trust of intangible property while a resident of Colorado, with a Colorado corporate trustee. The decedent retained a life estate in the trust property and a power of revocation. Jurisdiction of the state of domicile of each donor to collect a death tax was upheld on the ground that each donor was the owner at the time of death of the property transferred; in the former because the reserved power to appoint at death,

> *Graves* vs. *Schmidlapp*, 315 U. S. 657, 660;
> *Chase National Bank* vs. *United States*, 278 U. S. 327, 338;
> *Bullen* vs. *Wisconsin*, 240 U. S. 625, 631;
> *Whitney* vs. *Tax Commission*, 309 U. S. 530, 538;

and in the latter because the reserved power to revoke

> *Bullen* vs. *Wisconsin*, 240 U. S. 625,

were deemed equivalent, for tax purposes, to ownership of the property subject to the powers. Jurisdiction to tax was determined in each of these cases as of the date of transfer of absolute ownership from the donors to the donees, which, because of the reserved powers, was the date of death when the power to appoint was exercised and the power to revoke was terminated.

In *Graves* vs. *Schmidlapp, supra,* the state of domicile of the appointor of a power (New York) was held to have jurisdiction for estate tax purposes over the corpus of a trust even though the property was held in trust in another state (Massachusetts). Again the power to appoint was deemed equivalent to ownership of the property subject to the power, and taxable at the domicile of the owner on the authority of the *Curry* and *Elliott* cases.

Bullen vs. *Wisconsin, supra,* involved the taxation in Wisconsin of a trust created by a resident of that state in Illinois, over which he reserved powers to revoke and appoint. Wisconsin's right to an inheritance tax was sustained against the claim of want of jurisdiction because of the physical presence of the trust property in Illinois.

The attention of the Court is also directed to the following decisions of state courts in which the power of the state of domicile of the transferor to tax the transfer of intangible personal property, under an irrevocable, *inter vivos* trust created elsewhere, has been sustained.

Blodgett vs. *Guaranty Trust Co.*, 144 Conn. 207, 158 Atl. 245.

Hackett vs. *Bankers Trust Co.*, 122 Conn. 107, 187 Atl. 653.

In re Ellis' Estate, 169 Wash. 581, 14 P. (2d) 37.

In all of these cases the right of the state of domicile of the owner of intangibles to assess a domiciliary inheritance tax was sustained, on the principle that residence within the state at the time of the taxable event is sufficient in itself to confer jurisdiction to tax the transfer of intangibles wherever located.

If the principles of the *Curry* and *Elliott* cases can be extended to such irrevocable and uncontrolled transfers as involved in the *Pearson* and *VanDyke* cases, and to support an *ad valorem* tax on a resident's life interest in a nonresident trust, as in *Stewart* vs. *Pennsylvania*, 312 U. S. 649,

it is respectfully submitted that they can be applied here without distortion.

But appellants challenge application of several of these authorities on alleged factual differences. They argue that the *VanDyke* case cannot be deemed controlling, first, because it involved a gift tax—not an inheritance tax—and, second, because the trustee and inferentially all of the beneficiaries were residents of the state of the donor's domicile; adding also that it does not appear that any of the trust beneficiaries in the *Pearson* case were nonresidents of the State of Oregon. Apparently the fact has been overlooked that the only authority cited for affirmance of the tax in the *VanDyke* case was *Pearson* vs. *McGraw*, an inheritance—not a gift—tax proceeding, justifying the inference that this Court saw no difference in the nature of the proceedings or the applicable legal principles. And long ago it was held, and not questioned since, that where jurisdiction to tax is based on domicile of the transferor of intangibles within the taxing state, the residence of the trustees and beneficiaries is immaterial.

Keeney vs. *New York*, 222 U. S. 525, 537.

See also:

Graves vs. *Schmidlapp*, 315 U. S. 657, 661;

and compare:

Bullen vs. *Wisconsin*, 240 U. S. 625;
Graves vs. *Elliott*, 307 U. S. 383;
Curry vs. *McCanless*, 307 U. S. 357;

in each of which the trustee resided in a state other than that in which the donor lived.

Emphasis is also laid by appellants on the fact that the gift in the *Pearson* case was "admittedly" made in contemplation of death. The significance of this difference is

not enlarged upon and is not readily apparent. Atkins' transfers were held by the New Jersey courts to have been made in contemplation of death as well as to take effect at or after death, and appellants have not to this date contested either of these rulings. As a matter of fact they concede that this "finding is not questioned on this appeal." (Brief, 5.) Further, that determination is not challenged here by any facts appearing of record. *Cf.*

Milliken vs. *United States*, 283 U. S. 15, 19.

That the donor in the *Pearson* case did not reserve a life interest in the trust estate is also stressed by appellants as a distinguishing feature (Brief, 34). Because the donor transferred beneficial possession as well as legal title, appellants argue that the transfer was complete when made. Reservation of income for life from the property transferred is a decisive factor in determining whether a transfer is of a taxable nature, i.e., whether it was intended to take effect in possession and enjoyment at or after death. See *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509. But it has never been held, as far as appellee is aware, that this fact has a controlling effect on the question of jurisdiction to tax.

It is further urged that the circumstances surrounding the transfers in the *Pearson* and *VanDyke* cases evidenced an obvious intention to evade taxation, while here there is no suggestion that the transfer was to evade death duties. Power to tax in this case is not based on an attempted circumvention of the New Jersey tax laws. Where the power to tax exists it is not important whether there was an intention to evade or avoid taxation.

Bullen vs. *Wisconsin*, 240 U. S. 625.

Appellants say that the *Curry* and *Elliott* cases have no application because the transfers there taxed took effect as of the dates of death and not at the time of the execution

of the agreements of trust. That is true, but the principle applied in those cases; i. e., that the *inter vivos* transfer of intangibles may be taxed by the state of domicile of their owner regardless of their physical situs, has the same force in the instant matter as there. The transfers in those cases were deemed taxable as of the dates of death of the respective donors because by retention of a power to appoint and a power to revoke they, for tax purposes, remained the legal owners of the trust property until the power to appoint was exercised at death, and the power to revoke was extinguished by death, thereby moving the taxable event down to the date of death. Such being the effect of the reserved powers, it necessarily followed that the transfer of the intangibles, no matter where located, by a resident owner, was subject to a domiciliary inheritance tax on the authority of *Blodgett* vs. *Silberman*, 277 U. S. 1. Since Atkins reserved neither power to appoint, revoke or otherwise control the final disposition of the trust estate, the transfer of the estates in the trust property took place as of the date of the trust agreement. On that date he made a gift in contemplation of and intended to take effect in possession and enjoyment at his death of intangible property in which his ownership was then as full and complete as the ownership of the transferors in the *Curry*, *Elliott* and *Silberman* cases. That power to tax exists whether the transfer is fully completed *inter vivos* or remains subject to the donor's control until death, is made certain by this Court's determinations in the *Pearson* and *VanDyke* cases, where the power of the state of domicile to tax a fully completed *inter vivos* transfer was affirmed, in the latter case solely on the authority of the former, and in the former on the authority of the *Curry* and *Elliott* cases.

Finally appellants claim that the *Pearson* and *VanDyke* cases have no application whatsoever because the estates there created, they say, vested as of the dates of the respective trusts, while here the estates were contingent, which

leads to consideration of their principal contention that the power to tax in the case of an *inter vivos* transfer of future interests of a contingent character must be determined as of the date of death of the donor; and, as of that date, neither the property, nor the "owner," was within the jurisdiction of New Jersey for tax purposes.

POINT IV.

Appellants Are in Error in Alleging That the Power to Tax Must Be Determined as of the Date of the Donor's Death and That the Owner of the Property Transferred Was the Trustee and Not the Donor.

Specifically, their position is that:

> "* * * From the time of the execution of the trust agreement the *title* to these securities was in the New York *trustee* and, if the above mentioned maxim has any value, their fictitious situs based on the domicile of the owner was in New York, as well as their actual situs." (Brief, 16-17.)
>
> "* * * The full legal title was and had been for some years in the New York *trustee*. Both the actual situs and the *ownership* were in that state, and there was no New Jersey *ownership* with which to construct a fictitious situs through the maxim *mobilia sequuntur personam*." (Brief, 39-40.)

Relying on *Binney* vs. *Long*, 299 U. S. 280, appellants argue that since the estates of the ultimate beneficiaries were determined by the New Jersey courts to have been contingent until the death of the donor, the power to tax must be decided as of that date, rather than as of the date of the deed. That case and *Coolidge* vs. *Long*, 282 U. S. 582, involved the power of the State of Massachusetts to collect inheritance taxes on transfers pursuant to deeds of

trust executed at a time when there was no law in effect taxing such transfers. In the *Coolidge* case, where the estates were deemed to have vested as of the date of the deed, the transfers were held not taxable under a statute passed subsequently but before the donor's death. In the *Binney* case, because of the contingent nature of the estates, the transfers were held taxable under an act passed before the donor's death, even though after the effective date of the deed. The controlling principle of these cases is that in determining power to tax we must look to the date of the deed begetting the transfer. If the power to tax then exists it is within the power of the state to say when and how that power shall be exercised.

We are not here concerned with an attempted retroactive application of a tax law. This is not a tax on a transfer of property fully perfected before enactment of the tax law, such as condemned by this Court in

Nichols vs. *Coolidge*, 274 U. S. 531;
Untermyer vs. *Anderson*, 276 U. S. 440;
Helvering vs. *Helmholz*, 296 U. S. 93;
White vs. *Poor*, 296 U. S. 98.

Chapter 228, Laws of New Jersey, 1909, taxing *inter vivos* transfers in contemplation of and intended to take effect at or after death, had been in operation nearly twenty years before the execution of the trust in the instant case.

But appellants say that no rights passed and no estates were created when the deed was executed, and that we must, therefore, look to the date of the donor's death in determining whether a taxable transfer resulted. They claim that as of the date of death, when the estates vested, the beneficiaries were nonresidents and the property comprising the trust was neither located within nor *owned* by a resident of New Jersey. The domiciles of the beneficiaries and the physical location of the trust intangibles, as

previously observed, are not controlling factors, but the domicile of the *owner* is decisive. Without conceding that power to tax is to be decided as of the date of the donor's death, let us consider the import of appellant's claim that the *owner* of the intangibles at the decedent's death was a nonresident of this State.

When appellants say that New Jersey cannot tax because the "owner" of the property was domiciled outside this State, they do not, of course, mean the decedent. He was at all times a resident of this State. What they deem decisive in this case is not the domicile of the donor who made the transfer, but the domicile of the trustee voluntarily selected by decedent to effectuate his testamentary plan. The single formal element relied upon to oppose the tax is, therefore, that *the trustee was not a resident of New Jersey at the time of the donor's death.*

For the contention of appellants to have a semblance of validity, it is necessary to make three primary assumptions, each superimposed upon the other. First, it must be assumed that by the deed the trustee received such absolute title and ownership of the property that its act in transferring the property to the donees, at decedent's death, was not the act of the decedent, but the independent and voluntary act of the trustee; second, if the trustee acted independently of the donor, then the donees derived their succession not from the donor but from the trustee; and, third, if the donees derived their succession from the trustee, then, since ours is a succession tax, New Jersey is seeking to impose a tax on succession from a nonresident—a living nonresident, incidentally—involving intangibles not located in the State, in excess of its constitutional power.

Presumably if the trustee in the instant case had been a New Jersey bank or individual residing in this State at the time of the donor's death, appellants would concede power to tax (Brief, 35), and yet if their theory is

correct that the only transfer which can be taxed is the transfer from the *trustee* to the beneficiaries, it is difficult to understand how a tax could be levied even in that event, since the New Jersey law does not attempt to impose an inheritance tax on transfers from corporations to their transferees under any circumstances, nor on transfers of living individuals, even though they be trustees, when not made in contemplation of or intended to take effect at or after death. The fact is that on their theory the donor, the donees and the trustee may all be residents, the trust deed executed, and the trust property physically located and fully administered here, and still no tax could be levied because the transfer would be from the *trustee* to the donees, and not from the donor. Even transfers by will and the intestate laws could not be reached under the present law because the taxable event, as they argue, would be the transfer from the executor, the administrator, or the testamentary trustee, as *owner*, to the beneficiaries or next of kin. And joint bank accounts and life insurance proceeds could not be reached because the actual transfers in those instances would be by the banks and insurance companies.

Appellants do not cite a single authority for this novel claim and none is known to appellee. To the contrary, this Court has consistently ruled that a transfer through the intervention of a third party may be taxed the same as one directly from the decedent to the beneficiary.

> *Chase National Bank* vs. *United States*, 278 U. S. 327, 337.
>
> *United States Trust Co.* vs. *Helvering*, 307 U. S. 57, 60.

And it is not necessary that the property comprising the taxable transfer be *owned* by the donor at death. Transfers arising out of joint tenancies, tenancies by the entirety, the exercise of a power of appointment conferred by the

will of another, life insurance proceeds payable to specifically designated beneficiaries, and gifts in contemplation of death and intended to take effect at death may be included in the taxable estate, notwithstanding the fact that the decedent is not the "owner" at the time of his death of the property passing, and that it forms no part of his estate for testate or intestate distribution.

Whitney vs. *Tax Commission*, 309 U. S. 530, 538.
United States vs. *Wells*, 283 U. S. 102, 116-117.
Helvering vs. *City Bank*, 296 U. S. 85, 91.
Porter vs. *Commissioner*, 288 U. S. 436, 442, 443.
Tyler vs. *United States*, 281 U. S. 497.
Helvering vs. *Hallock*, 309 U. S. 106, 110, 111.

"In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death; nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.

"The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of the decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* vs. *United States*, 281 U. S. 497; likewise the full value of property in which the decedent was only a joint tenant may be taxed to his estate, *United States* vs. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the 'beneficial interest' owned by the decedent just

before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change beneficiaries, excluding, however, himself and his estate from the range of choice. *Porter* vs. *Commissioner*, 288 U. S. 436."

Whitney vs. *Tax Commission*, *supra* (at pages 538, 539).

Of course in every case of transfer by trust, whether testamentary or *inter vivos*, the sequence of tradition is from the donor to trustee and from trustee to ultimate beneficiary. Certainly it is apparent, without argument, that if the New Jersey act limited taxation to a succession that is derived from the "title owner" of property, the "title" could be shifted around *ad infinitum*. Furthermore, the provision taxing transfers in trust would be superfluous in the case of corporate trustees, for we would never have a "decedent." In fact, even as to individual trustees the situation would be no different, since the transfer would be from a living person and certainly could not be said to have been made in contemplation of or to take effect at or after his death, when he was simply carrying out the directions of his principal as set forth in the trust agreement. Only where the donor appointed himself the sole trustee would appellants' theory admit a taxable transfer had occurred. What the answer would be in a case where the donor appointed himself and a corporation trustee is not known.

Before the Court of Errors and Appeals appellants argued that:

"In the case at bar, there are two transfers of the title to the trust fund assets, one when the grantor

> divested himself thereof, and conveyed everything he owned to the trustees irrevocably and second when the title passed from the trustees to the beneficiaries. It is the latter transfer and not the former one which is the taxable transfer."

Certainly that is not the law in New Jersey.

> *Carter* vs. *Bugbee*, 92 N. J. Law 390, 392.
> *Fagan* vs. *Bugbee*, 105 N. J. Law 85, 87.

The Court of Errors and Appeals in *Carter* vs. *Bugbee*, *supra* (at page 392), says that:

> "* * * the transfer intended to be taxed is that of the settlor to his beneficiaries, and not that to his trustees."

And without enlarging on that statement beyond logical implications we may add "and not that by the trustees to the beneficiaries." Looking through form to substance and practical result the Court in the *Carter* case says that where *inter vivos* transfers are involved, the only parties to be considered are the donor and his donees. And this practical view fully accords with the expressions of this Court in the numerous cases hereinafter cited to the effect that in the application of the due process clause to these tax matters technical considerations and the niceties of the law of trusts and conveyances should not obscure the basic issue. (*Helvering* vs. *Clifford*, 309 U. S. 331, 334.)

Appellants concede that "the rights of the parties were unalterably fixed, as far as the decedent's ability to change them was concerned, by the trust deed, which was irrevocable, and contained no power of appointment" (Statement as to Jurisdiction, page 17), but they do not reconcile this concession with their claim that no transfers of a taxable

nature arose at the time the trust was created. In denying this claim the Prerogative Court ruled (R. 47-48):

"That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency, is not true. It cannot be controverted that there *was* a transfer of interest from the owner-grantor; and that the *only act* of the owner-grantor in making that transfer was the execution and delivery by him of the deed of trust. That deed was irrevocable, and after its execution and delivery there was no act by the grantor, and no failure to act by him, which in any wise did, or could, have any operation or effect in effectuating or preventing the transfer. By the deed he made a transfer of the interest in remainder, and thereafter he had no control whatever over that interest. Thereafter that interest must necessarily vest, at his death, in one or other of the alternative contingent remaindermen—and that by operation of the deed which he had made. It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; but it is inescapable that *he* made the transfer; and that he made it *at and by* his execution and delivery of the trust deed; and that that execution and delivery was the *only* thing he did in making the transfer."

(Emphasis above by the Court.)

The same view of an identical situation was taken by this Court in *Coolidge* vs. *Long*, 282 U. S. 582, where the trust provided that the

"income was to be paid in these proportions (four-sevenths and three-sevenths) to each of the settlors

> during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons; provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of the survivor, * * * (pages 593-594.)

and where the Court, as here, was dealing with the power of a state to levy a succession tax—a tax on the right of the beneficiary to receive—and not a transfer tax. The trust was irrevocable (page 594). Under these circumstances this Court said (at pages 597, 598):

> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. *It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor.* * * * *The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment.* The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. * * * *Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries.* Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. * * * Nothing moved from her or him or from the estates of either when she or he died. *There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds.* * * *"

Incidentally, it might be observed at this point that if the time for the determination of the power to tax is to turn on the question whether the estates created are vested, subject to divestiture, or merely contingent, then another question arises, viz.: Is the character of the estates to be decided by the State courts or by this Court? In the *Coolidge* case (at page 597) this Court held that:

> "* * * It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution. * * *"

While the New Jersey courts have termed the estates of the sons contingent, nevertheless, it is to be observed that they are created in the same language used by the donors in *Coolidge* vs. *Long*, *supra*, where this Court ruled such estates to be of a vested nature for purposes of constitutional inquiry, even though they remained defeasible until the death of the survivor of the donors. So that even applying technical rules here for the ascertainment of the character of the sons' interests, still there is no error in fixing the taxable event as of the date of the deed of trust. If, to the contrary, state court characterization of the quality of the estates created in each case is to be conclusive here, then, of course, inheritance taxes on identical trusts will be held to violate or not to violate the due process clause, depending upon whether the estates transferred are deemed locally to be defeasible or merely con-

tingent. It is not believed that application of the refinements of the law of trusts has ever been carried this far.

But appellants say that if the transfer took place when the deed was executed, still the State did not then appraise the property and estates transferred, as they infer was done in *Pearson* vs. *McGraw*, and levy a tax as of that date, according to the quality and value of the interests as they then existed, but that it valued the trust property as the donees took it on the date of the donor's death. There is no basis for the supposition that Oregon, in the *Pearson* case, valued the property there transferred as of the date of transfer. But be that as it may, the fact is immaterial since the rule is that

> "* * * * where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any federal question."
>
> *Keeney* vs. *New York*, 222 U. S. 525, 537.

Only the value of the corpus as of the date of death, computed at $376,917.04, was included for tax purposes, whereas the trust had at least a par value on the date of creation of $389,800. As further observed in the *Keeney* case (at page 537):

> "* * * * The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. * * * *"

Where the transfer is taxable when made, there is no constitutional objection to legislation requiring valuation of the property as of the date of the donor's death rather

than as of the date of transfer, or the application of higher rates of taxation in effect at a later date.

Milliken vs. *United States*, 283 U. S. 15.
Klein vs. *United States*, 283 U. S. 231.
Salomon vs. *State Tax Commission*, 278 U. S. 484, 490.

"• • • The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* vs. *Brewster*, 203 U. S. 543."

Salomon vs. *State Tax Commission*, *supra* (at p. 490).

Once liability to tax is established the assessment of the tax becomes mere machinery. The New Jersey courts have ruled that property transferred in contemplation of and to take effect at or after death shall be valued as of the date of death.

Wimpfheimer vs. *Martin*, 126 N. J. Law 502.
Nicholas vs. *Martin*, 127 N. J. Law 35, aff'd, *sub nom.*, *Rutgers* vs. *Martin*, 127 N. J. Law 603.
Hartford vs. *Martin*, 122 N. J. Eq. 489, 498, 499, aff'd, 120 N. J. Law 564, aff'd, 122 N. J. Law, 283.

Before the Court of Errors and Appeals appellants conceded that:

"• • • If the trust instrument had created a vested remainder, domicile of the grantor at the time of its execution would have been sufficient."

Appellants apparently reason that a New Jersey resident may not avoid domiciliary inheritance taxes by stepping out of the state momentarily and making either an outright gift or even one in trust with a nonresident trustee, of intangibles located elsewhere, if the estate in remainder

is a vested one, but that he may accomplish this purpose if he will but create contingent remainders. Power to tax a vested estate in remainder seems to be conceded even in face of their claim that the "owner" of the trust property at the donor's death, i. e., the trustee, would not be legally domiciled in this State and that actual transfer of the property in that case, as in the case of a contingent remainder, would be from the trustee and not from the donor. How they reconcile these facts, present with equal force in each situation, is not stated. In any event, it is clear that the result, if it has any justification at all, is reached only by the application of highly technical rules rather than by a consideration of substance and practical result. Questions of power to tax are to be governed by the substance of things rather than by the application of technical considerations, niceties of the law of trusts or conveyances or the casuistries of the law of contingent and vested remainders.

Helvering vs. *Clifford*, 309 U. S. 331, 334.
Helvering vs. *Hallock*, 309 U. S. 106, 117, 118.
Smith vs. *Shaughnessy* (decided February 15, 1943—not yet officially reported), 87 L. Ed. (Adv. Op.) 504, 506, 63 S. Ct. 545, 547.
Tyler vs. *United States*, 281 U. S. 497, 503.
Pearson vs. *McGraw*, 308 U. S. 313, 318.
Saltonstall vs. *Saltonstall*, 276 U. S. 260, 271.
Klein vs. *United States*, 283 U. S. 231, 234.

"* * * Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue."

Helvering vs. *Clifford*, *supra* (at page 334).

"* * * The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignor-

ing the other. * * * The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. *Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.*"

Helvering vs. *Hallock*, *supra* (at pages 117, 118).

To permit the taxing power to extend to vested but not contingent remainders would certainly substitute form for substance. As this Court said in *Pearson* vs. *McGraw*, *supra* (at page 318):

"* * * to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance. * * * Questions of due process are not to be treated 'narrowly or pedantically, in slavery to forms or phrases.' * * *"

and again in *Smith* vs. *Shaughnessy*, *supra* (at p. 506):

"We cannot accept any suggestion that the complexity of a property interest created by a trust can serve to defeat a tax. For many years Congress has sought vigorously to close tax loopholes against ingenious trust instruments. Even though these concepts of property and value may be slippery and elusive they cannot escape taxation so long as they are used in the world of business. * * *"

Want of power to tax, appellants argue, is grounded on the fact that the donor in making the transfer, exercised no privilege and received no protection or benefit conferred by the laws of New Jersey, therefore there is no basis for the imposition of a tax (Brief, pages 17, 18). But this Court has said in *Curry* vs. *McCanless, supra*, that "it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax" (page 368) and that "A jurisdiction which does not depend on physical presence within the State is not lost by declaring that it is absent." (page 366.) Here jurisdiction to tax is based on the domicile of the owner, not on physical presence of the trust estate, within the boundaries of New Jersey. That the donor chose to avail himself of privileges and benefits conferred by the laws of another jurisdiction cannot deprive the state of his domicile of its power to tax. If the rule were otherwise this Court could not have reached the conclusion that it did reach in the *Curry*, *Elliott*, *Pearson*, *VanDyke*, *Keeney* and *Bullen* cases, since in each instance the transfer in the final analysis was accomplished without recourse to the laws of the state of domicile of the donor. Likewise probate of a testator's will and administration of his estate elsewhere have never been held to deprive the state of domicile of its power to tax the testamentary transfer of his intangibles wherever located.

Blodgett vs. *Silberman*, 277 U. S. 1.
Nevin vs. *Martin*, 22 F. Supp. 836, 840.
In re Hartman's Estate, 70 N. J. Eq. 664.

As made clear in the *Pearson* and *VanDyke* cases a legally domiciled donor may not claim freedom from a domiciliary tax on the transfer of intangibles under the due process and equal protection clauses, by the simple expedient of stepping across state borders and making the transfer.

POINT V.

The Court of Errors and Appeals Correctly Held That the Assessment and the Statute Under Which It Was Levied Did Not Violate Any Provision of the Fourteenth Amendment.

It is settled that there is no constitutional inhibition against taxing *inter vivos* transfers of a testamentary character along with transfers by will and the intestate laws in order to prevent facile evasion of death duty laws.

Keeney vs. *New York*, 222 U. S. 525, 533, 534.
Guaranty Trust Co. vs. *Blodgett*, 287 U. S. 509, 513.
Coolidge vs. *Long*, 282 U. S. 582, 596.
Milliken vs. *United States*, 283 U. S. 15, 20.
Bullen vs. *Wisconsin*, 240 U. S. 625.

And to accomplish this well-understood purpose it is quite apparent from the determinations in the *Pearson*, *Van-Dyke*, *Curry* and *Elliott* cases that the states are allowed great latitude without infringing constitutional provisions.

Although there is no constitutional barrier to double taxation,

State Tax Commission vs. *Aldrich*, 316 U. S. 174.
Curry vs. *McCanless*, 307 U. S. 357, 368.
Graves vs. *Elliott*, 307 U. S. 383.
Graves vs. *Schmidlapp*, 315 U. S. 657.
Cream of Wheat Co. vs. *Grand Forks*, 253 U. S. 325.

it should be mentioned that the question here is not whether the transfer of the intangible property should be taxed twice, but whether it shall be taxed at all. If New Jersey, the domicile of the transferor, cannot tax, then there will be no tax, since New York has asserted no claim to a tax, having no statute for the taxation of the transfer of intangibles of nonresidents, and having had since January 1, 1939 (Art. XVI, sec. 3), the following constitutional provision against such taxation:

"Sec. 3. Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, *if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation.* Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

In fact New York and New Jersey are included in a group of thirty-seven states and the District of Columbia limiting taxation of the transfer of intangibles to the state of domicile of the owner, [3] either because they have no laws for the purpose,[4] or because they have enacted reciprocal exemption statutes,[5] leaving only seven states that specifically tax such transfers[6]—the remaining five have not been classified because of statutes of doubtful application.[7]

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[3] See Vol. 4, Commerce Clearing House, Inc., Inheritance, Estate and Gift Tax Service (7th Ed.), pages 81,045 *et seq.*, sec. 12,080.

[4] Of which there are 18: Connecticut, Delaware, District of Columbia, Florida, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Rhode Island, Tennessee, Vermont, Virginia, Washington.

[5] Of which there are 19: California, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, West Virginia, Wisconsin, Wyoming.

[6] Arizona, Idaho, Montana, Oklahoma, South Dakota, Texas, Utah.

[7] Alabama, Arkansas, Colorado, Georgia, Kentucky.

A majority of the states, therefore, have adopted a policy of one death duty on the transfer of intangibles, and that at the domicile of the transferor, thereby agreeing among themselves that the state of domicile has a superior claim. Obviously, however, if residents may escape the domiciliary tax by creating their irrevocable trusts of intangibles elsewhere, then it will be imperative that the death tax laws of those states be revised to prevent such property from going tax free.

There is no indication in the previous decisions of this Court that such a change is necessary. Consistently this Court has upheld the power of the state of domicile to tax the transfer, in trust, of intangibles wherever situated, whether the trust was subject to a power to control reserved by the transferor, as in the *Curry* and *Elliott* cases, or was absolutely beyond the control of the transferor, as in the *Pearson* and *VanDyke* cases.

Power to tax, this Court ruled in *Curry* vs. *McCanless*, *supra* "has not been thought to depend on any factor other than the domicile of the owner within the taxing state." The donor here being a resident at all times, and the property transferred being intangible in character, the Court of Errors and Appeals correctly decided that New Jersey possessed the power to tax the transfer, and that New Jersey by an act in effect long prior to the effective date of the transfer has exercised that power; therefore, it is respectfully submitted that the judgment below should be in all respects affirmed.

David T. Wilentz,
Attorney-General of New Jersey.

William A. Moore,
Assistant Attorney-General,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 659.—October Term, 1942.

Central Hanover Bank and Trust Company, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors, etc., et al., Appellants, *vs.* William D. Kelly, State Tax Commissioner of New Jersey.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[May 3, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

New Jersey imposes a tax, with exceptions not material here, "upon the transfer of any property, real or personal, of the value of five hundred dollars ($500.00), or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, . . . in the following cases . . . Third. When the transfer is of property[1] made by a resident . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death," Rev. Stat. 1937, § 54:34-1.

Prior to 1929 decedent, who at all times relevant here was a resident of New Jersey, owned certain securities which he kept in New York City in safekeeping with the appellant trust company, a New York corporation. In 1929 he went to New York City and executed a trust agreement by which he transferred those securities to the appellant corporation as trustee. The trust deed was an irrevocable agreement under which he retained no control over the property. It contained a provision that it was to be construed according to the laws of New York where it was made and where it was to be enforced. It provided that the trustee should pay the net income to the grantor during his life and thereafter to his wife

[1] The statute embraces the transfer of property "whether such property be situated within or without this State." Rev. Stat. 1937, § 54:33-1. The word "transfer" is defined so as to include "the passing of property, or any interest therein, in possession or enjoyment, present or future," by deed. *Id.*

for life in case she survived him. In the event that the grantor's wife did not survive him and his two sons did, then the trustee was to transfer to each son one-half of the principal. The wife predeceased the grantor, who died in 1936 a resident of New Jersey. Both sons survived him. They were non-residents of New Jersey. The securities were at all times kept in New York and there administered by the trustee.[2]

The New Jersey Prerogative Court held on an appeal from the Tax Commissioner that the creation of the so-called equitable contingent remainders in the sons was a "transfer" of an interest in the property by deed within the meaning of the statute at a time when the grantor was domiciled in New Jersey;[3] that that transfer was made in contemplation of the grantor's death and intended to take effect in possession or enjoyment at or after his death; and that it was that transfer rather than the property on which the tax was laid. It accordingly upheld the assessment of the Commissioner against the contention of appellants that the statute as construed and applied violated the due process and equal protection clauses of the Fourteenth Amendment. 129 N. J. Eq. 186. Both the Supreme Court and the Court of Errors and Appeals of New Jersey affirmed. See 127 N. J. L. 468, 129 N. J. L. 127. The case is here on appeal. See 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone* v. *Miller*, 188 U. S. 189; *Blodgett* v. *Silberman*, 277 U. S. 1; *Curry* v. *McCanless*, 307 U. S. 357 and cases cited. The command of the state over the owner, the obligations

[2] Art. XVI, Sec. 3 of the Constitution of the State of New York provides: "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purpose of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation."

[3] The Court held in the alternative that there was a taxable transfer under the statute even if it be assumed that the remainder was vested in the grantor until the happening of the contingency. Under that view there was no transfer until the actual vesting at his death. Yet, at that time he was domiciled in New Jersey. So the transfer was taxable. 129 N. J. Eq. pp. 212-213.

which domicile creates, the practical necessity of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax. *Curry* v. *McCanless*, *supra*. We recently applied that principle to sustain, on facts very close to the present ones, Oregon's power to tax a transfer of intangibles held in Illinois by one domiciled in Oregon. *Pearson* v. *McGraw*, 308 U. S. 313. And see *Van Dyke* v. *Tax Commission*, 235 Wis. 128, aff'd 311 U. S. 605. The execution of the present trust agreement in New York, the circumstance that the remaindermen as well as the trustee were non-residents of the taxing state are quite immaterial. Domicile is the single controlling consideration in this situation, as it is in the case of the taxation of income derived from activities outside the state. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308.

Appellants contend, however, that at the time of the execution of the trust agreement there was no taxable transfer to the sons; that their interests were wholly speculative and contingent and did not become taxable until they became vested interests; and that New Jersey has not levied a tax according to the quality and value of the interests as they existed in 1929 but has appraised the property at its value at the time of the grantor's death. They also argue that if the trust agreement be construed to transfer an interest to the sons only at the grantor's death, it was a transfer which New Jersey could not tax.

The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us. *Orr* v. *Gilman*, 183 U. S. 278, 285; *Chanler* v. *Kelsey*, 205 U. S. 466, 476; *Nickel* v. *Cole*, 256 U. S. 222, 225-226; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270. There is no constitutional reason why a state may not make the transfer *inter vivos* the taxable event and then measure the tax by the value of the property at time of death. *Keenan* v. *New York*, 222 U. S. 25. Cf. *Milliken* v. *United States*, 283 U. S. 15, 20, 22, 23; *Helvering* v. *Hallock*, 309 U. S. 106, 111; Paul, Federal Estate and Gift Taxation (1942) § 2.13. A state which may tax the disposition of property made by one of its domiciliaries certainly may make the payment of the tax conditional on his being domiciled in the state at his death, and may delay payment until then. The

fact that the taxable event and the tax levy are widely separated in time is quite irrelevant. In short, "The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." *Salomon* v. *State Tax Commission*, 278 U. S. 484, 490. And if the transfer to the sons is assumed to have taken place only at the time of the grantor's death, there is no constitutional reason why the result need be different. The fact that he did not then "own" the property is inconsequential. Cf. *Whitney* v. *State Tax Commission*, 309 U. S. 530. The significant facts are that the rights of the remaindermen derived solely from the trust agreement and that the grantor died domiciled in New Jersey.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.